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TAS

HINDU LAW;

PRINCIPALLY

WITH REFERENCE TO SUCH PORTIONS OF IT

AS CONCERN

THE ADMINISTRATION OF JUSTICE,

IN THE

KING'S COURTS,

IN

India.

BY SIR THOMAS STRANGE,

LATE CHIEF JUSTICE OF MADRAS.

VOL. I.

Omnes, (*civitates*,) suis legibus et judiciis usæ, *αὐτονομίαν* adeptæ, revirescunt. Cic. Ep. ad Attic. c. vi. ep. 11.

Let him (the king) establish the laws of the conquered nation, as declared in their books. Menu, ch. vii. v. 203.

LONDON:

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AND H. BUTTERWORTH, FLEET STREET.

1830.

TO

THE KING.

SIRE,

Filling successively at Madras, by the selection of your Majesty's revered Parent, our late respected Sovereign, the appointments of Recorder, and Chief Justice, the attention of the author of the following pages was, from an early period, called to the law of the Hindoos; the elements of which, as referable to the King's Courts in India, are now, with all respect, presented to your Majesty;—of all law, operating within your widely extended empire, the constitutional Depositary, and Guardian.

Accept, then, Sire, the author's duteous thanks, for your gracious permission, thus to lay at your Royal feet, this latest result of his

professional labours;—regarding, as they do, an important portion of your distant subjects.

Your Majesty's known goodness of heart, combined with characteristic judgment, will incline you to take a particular concern in the laws of a people, remarkable for having, in all time, looked with a kind of innate reverence to the office, and person, of a King. To a feeling at once so considerate, and so benign, the appeal will not have been made in vain, on behalf of millions upon millions, spread over vast provinces of the East;--by nature a gentle, and historically an interesting race, gratefully acknowledging your mild rule; and, in return for attachment, supplicating only, together with protection, the preservation to them of their Institutions, (however superstitiously deduced,) —subject to as little change, as may be consistent with its stability.

Compiled partly with this view, which nothing is likely so essentially to promote, as the Patronage here solicited, the Work alluded to

(the fruit of that leisure which, after above twenty years' service in judicature, the author owes to the Royal Bounty) is now, with all deference, inscribed to your Majesty, by

Sire,

Your Majesty's

Faithful and devoted

Subject and Servant,

THOMAS ANDREW STRANGE.

Bath, Jan. 1, 1830.

PREFACE.

In preparing the present edition of what was originally called "Elements of Hindu law," the author has no acknowledgments to make, in any quarter, for assistance, or suggestion; though invitation, and even solicitation, on his part, has not been wanting; as, independent of other reference, appears by the concluding paragraph of the Preface to the first. In this respect, the author has been careful not to be deficient in his duty. In a work of the kind, it was imperative.

Conscious how ungrateful is the subject;—bowing to the almost universal indifference as to what regards India, further than as our own direct interests are involved, the author is not disappointed,—not having been sanguine in his expectations;—and the failure of all encouragement of the sort, in the progress of such preparation, will have had no other effect, than that of stimulating his care and diligence, toward attaining his object, in the cultivation of his own resources.

The principal change in the present edition is in the arrangement of the matter; producing a different succession of chapters, with a reduction of them from thirteen to twelve. This has occasioned parts to be written over again, with considerable alteration; and these so incorporated and connected with the composition, as it originally stood, that, in justice to the purchasers and possessors

of the former edition, the author has thought proper to call it entirely in, replacing it to them with copies of the present revised one; which he will have spared no pains to render as free from faults of every kind, as will have been in his power.

However he may have succeeded,—this much he may confidently say;—he should have been glad to have found such a work extant, when he, in 1798, entered upon the administration of justice to the Natives, at the Presidency of Madras. The author is aware, that a great and happy advancement has been since made in the knowledge of Indian law, as of Indian subjects generally, derived from original sources. To such as may still be dependant in some degree, for necessary information, upon the sort of aid that is here offered, he may nevertheless resort to the old, hackneyed self-congratulation:

—— Si quid novisti rectius istis,
Candidus imperti, si non, &c.

Meanwhile, the republication may not be altogether ill-timed; at a period, when it is expected that every thing regarding our connexion with India is on the eve of undergoing a national review.

T. A. S.

Bath, 1st January, 1830.

PREFACE

TO THE FIRST EDITION.

The following work originates in the possession of a mass of opinions, upon points of Hindu law, delivered by their Pundits, on references from the Courts, dispersed in the territories, dependant on the government of Madras, transmitted to the author, at his desire, from time to time, for his information, by various Company's judges, through a period of several years, during which he exercised the judicial office, under the Royal Charter, at that Presidency; and, having been subsequently seen, and commented upon by Mr. Colebrooke, and, in some instances, by Mr. Sutherland of Bengal, as well as by the late Mr. Ellis of Madras, their respective "Remarks," annexed to them, seemed to render them documents of too great value, not to be turned, in some way or other, to public account; more especially, considering how little was known of Hindu law at the time, in that part of India.(1) At first, and during the author's continuance in India, nothing was in contemplation, beyond a selection of the papers alluded to, under some convenient arrangement. But, subsequent to his quitting it, and return to Europe, the posses-

(1) See 2d volume.

sion of leisure, with the desire to be useful, led gradually to the idea of a compilation, that might more effectually facilitate to all, having occasion to become acquainted with it, a connected knowledge of the law in question, to the extent of its use in the British Courts, established in India, under the direct authority of the King. Thus, what had been at first, not the principal only, but the sole intention, namely, to give publicity to what he so possessed, became in the end a subordinate one, as connected with the more extended idea, subsequently adopted. With this view, he proceeded, at his earliest convenience, to resume for the purpose his study of the Institutes of Menu, in the translation of Sir William Jones; that of the two treatises on Inheritance translated and illustrated by Mr. Colebrooke; in addition to which, he was fortunate enough to obtain in time the more recent tracts on Adoption, prepared, after the manner of Mr. Colebrooke, by his nephew, Mr. Sutherland; with a compendium of the law of inheritance, of some celebrity, translated by Mr. Wynch, also of the Bengal service. To these were added the work in every British Hindu jurist's hand, known familiarly by the name of Mr. Colebrooke's Digest; together with the Reports, through a succession of years, commencing previous to 1805, in the Sudder Dewanny Adawlut of Bengal.

The sources then of the following pages are, in general, First, The printed works on Hindu law, accessible to the English reader; compared with,—Secondly, the

MS. papers, of which some account has been given. It will be the business of this Preface to enlarge a little upon what has been already stated; intermixing briefly such notices as the subject may suggest, drawn principally from other MSS. in his possession;—the chief of those exhibiting statements and opinions, prevalent in Southern India, having been left by the late lamented Mr. Ellis of Madras, and recently transmitted to the author, by common friends of his, and of the deceased, at that Presidency.

I. The general body of ceremonial and religious observances, of moral duties, and of municipal law, constituting, in its most comprehensive sense, the Dharma Sastra of the Hindoos, and derived, as will be seen, in a succinct and masterly paper on the subject, subjoined to this volume,(1) consists, 1. Of their *Smritis*, or text-books, each in structure, and most in doctrine, the same with that of Menu;—attributed to authors, of whom scarcely any thing is known;—in many instances, not even their names, the assumed ones being fictitious. These are each divided into three *Candas*, or sections;—the *Achara Canda*, relating to ceremonies; the *Vyavahara*, to law; and the *Prayaschit*, to expiation. With the first and last *Candas* of these works, the following one has nothing to do.—2. Of *Glosses* and *Commentaries* on the text-books; —and, 3. Of *Digests*, comprehending either the whole system of jurisprudence, or relating only to particular

(1) Letter A, post, p. 315.

titles of law. Of the latter, the Digest, translated by Mr. Colebrooke, is an instance; embracing, as it does, only eight, out of the eighteen, acknowledged standing titles; and referable principally, as it professes to be, to the subject of Contracts and Successions.

1. Of the *Text-books*, varying in number, according to different authorities, from eighteen to thirty-six, and more,(1) the little that is known, in point of history, will be found in the successive Prefaces, by Mr. Colebrooke, to his translations of the Digest, and two treatises on Inheritance; in the latter of which, in particular, their respective value is accurately weighed and ascertained. By Parasara, author of one of these books, (referring to the Hindu division of the world into four ages,) are assigned, as appropriate to the *Crita Yuga*, or first age, the Institutes of Menu; to the *Trita*, or second, the ordinances of Gautama; to the *Dwapara*, or third, Sancha and Lichita; and to the *Cali*, or fourth, (the present sinful age, as it is deemed,) his (Parasara's) own ordinances. A text-book of authority, written for, and known to be applicable to the present age, could not but be of peculiar value; but, it having been observed, that these text-books consist each of three distinct parts, it happens that, in Parasara's, the second, or *Vyavahara*

(1) See Preface to Digest, p. xiii. et seq. The following list is according to Yajnyawalcya.—Menu; Atri; Vishnu; Harita; Yajnyawalcya; Ushanas; Angiras; Yama; Apastamba; Sanverta; Catyayana; Vrihaspati; Parasara; Vyasa; Sancha and Lichita, (who were brothers, and wrote each a Smriti separately, and another jointly: the three being since considered as one work); Dacsha; Gautama; Satatapa; and Vasishta. Parasara, whose name appears in the above list, enumerates also twenty select authors; but, instead of Sanverta, Vrihaspati, and Vyasa, he gives the names of Casyapa, Bhrigu, and Prachetas.

Canda, (which must have comprised his legal Institutes,) is entirely wanting: so that a professed commentary on this Smriti, that will be more particularly noticed, founds itself, in this respect, upon nothing belonging exclusively to Parasara, beyond a verse extracted from the *Achara*, or first *Canda*, purporting merely, "that the "princes of the earth are in this age enjoined to conform "to the dictates of justice." It is the opinion of the Southern jurists, and for this they sometimes cite Vrihaspati,(1) that *text-books* are not of themselves authority; and that the only final authority in Hindu law is to be sought, in these later times, in the conclusions and decisions of the authors of the several Digests and Commentaries, according to the schools, to which they respectively belonged;—that the former are of importance in the schools, where law is taught; but, abstractedly, of little in courts, where it is practised. On this ground, for want of an extended commentary upon them, (the glosses of Culluca and others being considered as explanatory only of the text,) the Institutes of Menu, though the undoubted foundation of all Hindu law, are looked upon by them as a work to be respected, rather than, in modern times, to be be implicitly followed.

2, 3. *Commentaries*, and *Digests*. These also are numerous: their number proceeding in part from the circumstance, that every succeeding dynasty in India did, at its commencement, give out, as the rule of its government, a new Commentary on, or a new Digest of, the

(1) 2 Dig. 128.

ancient text-books; the authority of which, to a certain degree local, may be supposed to have declined, with the declining power of the dynasty, under which they originated. These likewise have been noticed in the Prefaces, that have been alluded to; nor is it probable, that much that is material can be added to what Mr. Colebrooke has there said of them, whether as regarding their history, or their merits. To the English student, the *Daya Bhaga* of Jimuta Vahana, and the *Mitacshara* of Vijnyaneswara, (treatises on Inheritance,) are of peculiar importance;—as having been translated and illustrated by one, so competent as the person who undertook, and performed, as he did, that meritorious labour;—the one, the standard of law in Bengal; the other, received throughout the whole range, from Benares, to the southernmost extremity of the peninsula;—the doctrine of the latter, as of other works of the same school, being oftener, than might be imagined, at variance with that of Bengal. Their authority, within their respective limits, is demonstrated, by their having been so selected, as the best guides for our Courts, throughout the British dominions in India.(1) They are hence continually referred to in the following work; a great proportion of which concerns inheritance, according to the enlarged acceptation of that term among Hindu jurists. The like observation applies to the translation, by Mr. Wynch, of the *Daya Crama Sangraha*, of Sricrishna Tercalancara, a compendium of the same subject, noticed by Mr. Colebrooke as "good;"(2) and, in

(1) Post, Append. to ch. xi. p. 431.—C.

(2) Preface to the Treatise on the Hindu Law of Inheritance, p. vi.

an eminent degree, to those by Mr. Sutherland, of the *Dattaca Mimansa*, of Nanda Pandita, and the *Dattaca Chandrica* of Devanda Bhatta,—the standard treatises on the law of adoption;—of the former of which, previous to its translation, much use had already been made by Mr. Colebrooke, in his notes on the chapter of the *Mitacshara*, applicable to this important branch of Hindu law.

To these brief notices may with propriety be added a few, applicable to the same class of works, *not translated*, that are, next to the *Mitacshara* of Vijnyaneswara, of paramount authority in the territories dependant on the government of Madras. These are the *Smriti Chandrica*, the *Madhavya*, and the *Saraswati Vilasa*.

Of the author of the *Smriti Chandrica*, named Devanda Bhatta, little, if any thing, seems to be known. The work, attributed to him, was compiled during the existence of the *Vidyanagara* dominion (an extensive Southern empire, that flourished during the thirteenth, fourteenth, and fifteenth centuries of our era); but apparently not under the direct sanction of the government. It has been considered by Mr. Colebrooke, to be a work of uncommon excellence, if not superior, in extent of research, and copiousness of disquisition, to the *Madhavya*; though he would not venture to say, upon his own opinion, which would prevail, where they might be found to differ; while Mr. Ellis regarded it as valuable, for the information it affords, of the constitution of the several sorts of judicial tribunals, that existed in Southern India,

at the time when it was composed;[1]—and useful for practical purposes, as affording precedents for the forms of processes, deeds, &c.;—as well as for the clearness, with which points of law in it are discussed.

With regard to the *Madhavya*, compiled for the Canarese dominions, by Vidyaranyaswami, the eminently learned minister of the founder of *Vidyanagara;* who, living in the fourteenth century, may be considered to have been, as it were, the lawgiver of the last Hindu dynasty;—of the *first* and *third Candas* of this celebrated work, to which the author gave the name of his brother Madhava Acharya, the basis is the text of *Parasara* but, as has been already explained, having, for the *second*, nothing of that Smriti's to proceed upon, it became in fact, though not in name, a general Digest of all the legal authorities, prevalent at the time in his part of India. However this may detract in some degree from its effect, as being bottomed in truth upon no particular text, the general fame of the author is so great, resting, as it does, not upon this work alone, but, upon others also, particularly on his Commentary upon the four Vedas,—that, among his more intense admirers, he is held to have been an incarnation of Siva; and the work in question has, at all events, the advantage of being later in time than that of the *Smriti Chandrica*, upon the basis of which it has been thought by Mr. Colebrooke to have been evidently formed.

(1) See letter B. at the end of the volume, p. 321.

Somewhere about the twelfth century of our era, the princes of the *Cacatya* family, establishing themselves to the north of the Crishna, built Annumconda, or Orugallee, usually written *Warankul*, where they fixed their seat of government; which, extending itself by conquest, became the second great empire to the Southward; the first having preceded it about four centuries, while the third was that of *Vidyanagara*, already noticed. This second, comprehending, as it does, the territories now belonging to Hyderabad, the northern Circars, a considerable portion of the Carnatic, and, generally speaking, the whole of the countries, of which the Tailanga is at present the spoken language,—the *Sarаswati Vilasa*, a general Digest, attributed to Prataparudra-déva-Maha Raja, one of the above-mentioned princes, (but probably composed only under his direction,) became the standard law-book of his dominions; in which, (says Mr. Ellis,) the influence of its alleged regal origin, and the introduction of new notions, referable, as has been thought, to the progress of the Mahomedan invasions, extending themselves about that time in a southerly direction, is very apparent. For the first time in India, the will of the prince is in it declared paramount to the right of the subject; and the claim, on the part of the ruling power, to the absolute property in the soil, on which the modern revenue system of that country is founded, is here advanced. It continues to be a book of some authority to the northward of the Pennar, where many customs exist, particularly respecting the tenure of land, that are derived from it; yet, even here, within its proper

limits, it is in a great measure supplanted by that of the Commentary of Vijnyaneswara, the prevailing authority in Southern India.

To conclude this brief account of Hindu law-books with some notice of the *Digest*, that is in familiar use;—which, originating in the suggestion of Sir William Jones, was compiled by Jagannatha Tercapunchanana, (a learned Pundit,) and translated from the Sanscrit by Mr. Colebrooke;—it consists, like the Roman Digest, of texts, collected from works of authority, extant in the Sanscrit language only, having the names of their several authors prefixed, together with an ample commentary by the compiler, founded for the most part upon former ones. That its arrangement was not, on its first appearance, satisfactory to the learned, and that the Commentary abounds with frivolous disquisitions, as well as with the discordant opinions of different schools, not always sufficiently distinguished, rests upon the best authority, that of the learned translator; by whom, its utility, for the purpose for which it was planned, is well nigh disclaimed.(1) It is long, therefore, since it was characterized, not unhappily, as "the best law-book for a "counsel, and the worst for a judge." And, as its doctrines, taken commonly from the Bengal school, and originating sometimes with the compiler, differ often from the authorities prevalent in the South of India, it had become matter of regret with the author of the

(1) See preface by Mr. Colebrooke to his translation of Jagannatha's Digest, p. xi.; and more particularly that to his translation of the two treatises on Inheritance, p. ii.

Prefaces referred to below, adverting to the frequent use made of it by the Southern Pundits, on references to them by the Courts, "that they should have been thus "furnished with the means of adopting, in their answers, "whatever opinion may happen to be best accommo- "dated to any bias they may have contracted;" while he could not but deprecate its tendency to supersede, in the Peninsula, the works of "the much abler authors of the *Mi- "tacshara*, the *Smriti Chandrica*, and the *Madhavya*."(1) But, in whatever degree Jagannatha's Digest may have fallen in estimation, as a book to be used with advantage in our courts, and especially in those to the Southward, it remains a mine of juridical learning, throwing light upon every question on which it treats, whatever attention it may require in extracting it. In the course of the present work, proportional care has been exerted, in comparing passages apparently contradictory, or incongruous, (well known to exist upon almost every point of Hindu law,) as well as in drawing from the whole, after reference to other available information, the probable practical result;—to which are usually subjoined such citations, as seemed the best calculated to promote inquiry, if not to remove doubt. Such has been the use made of the *compiler's* part of the work; while the more frequent references are to the *texts;* for the greater part of which, by all unacquainted with the Sanscrit, resort hitherto can only be had with advantage to this Digest.

(1) Post, Append. to ch. IV. p. 176.

Among the reported decisions in the Sudder Dewanny Adawlut of Bengal, comprising cases of Mahomedan, as well as of Hindu law, deducting from the latter such as turn upon particular circumstances, or as proceed upon equitable principles, there are not many that establish any general rule. The few, however, of this description, being of the highest authority, are noted and respected accordingly in the ensuing work.

II. With regard to the *MS. materials*, valuable, as exhibiting the living law, upon subjects of daily occurrence, they form, with other documents, an Appendix, constituting the second volume; consisting chiefly of "Opinions" of Pundits, with "Remarks" upon them, distinguished by the letters C. E. and S.; as denoting respectively the names of Mr. Colebrooke, Mr. Ellis, and Mr. Sutherland.

To have published these opinions, with the references preceding them, in the state in which they were communicated, would have been attended with the effect, not only of extending this work in point of bulk, but with that also of loading its pages with much superfluous matter. The *references*, therefore, have been divested of their more formal parts, and, in some instances, the statement of facts has been shortened. With the *opinions*,(1) desultory and redundant as they continually are, beyond what could well be imagined, by any one not conversant with the

(1) On the subject of such opinions from the Shastrees at Bombay, there called *Vyavusthas*, see 1 Bombay R. p. 16, note.

manner of the Hindoos, greater liberty has been taken. Such being the Eastern style, from which the very oracles of their law are not free, the endeavour has been, in arranging what they have said, to render them clear, in as few words as possible, using the utmost care to extract, and exhibit their meaning. Sometimes scarcely meeting the question, they more frequently travel beyond it. In the latter instances, retrenchment has been employed; and, in order to attain coherence, passages have been occasionally transposed. Where irrevelant matter has been retained, it has been for the sake of some peculiarity connected with it in Hindu manners, or customs; and if, in some cases, opinions, palpably erroneous, have been admitted, it has been with a view to the corrections they have received, in the subjoined "Remarks." Thus dealt with, the papers alluded to will scarcely be recognized as the same, by those from whom the communication was derived; yet, if compared with the originals, it will be found, that the substance and effect of them has been preserved. But, were it otherwise, it would be comparatively of little consequence,—the value of the collection, as here exhibited, consisting principally in the "Remarks" with which it is accompanied. For, with regard to the Pundits, considering the infancy of the judicial establishment, provided for the dependencies on the Madras government, at the time when the collection was made, the authority of many cannot be looked upon as very great. The most competent (it may be presumed) were appointed. But, in that part of India, and at the time in question, little, if any encouragement, having been begun to be given to the

cultivation of learning among the natives, the field for selection could not be ample. Allowance is also to be made for the possibility of corruption, in particular instances, remembering always the declaration of Sir William Jones, "that he could not, with an easy conscience, concur in a decision, merely on the written opinion of native "lawyers, in any case in which they could have the "remotest interest in misleading the Court;"(1)—a reflection, adverting to the quarter from whence it came, that has long rendered desireable a work of the kind now attempted; as calculated, according to its execution, to enable the British Courts, administering the law in question, to check the propensity thus imputed to the native lawyer, as well as to obviate, in other respects, his casual deficiencies.

Of the "Remarks" that have been alluded to, the principal, in number and value, are Mr. Colebrooke's;—conveying, in most instances, not only his strictures on the points referred, and opinions reported, but references also to printed authorities, in support of his observations, or of the answer of the Pundit. They were, without any previous personal acquaintance, solicited, through the medium of a common friend, at an early period, with a view to individual satisfaction only,—not to publication; and, immersed as Mr. Colebrooke was at the time, in official duties of the highest importance, they were returned from Calcutta with a readiness, a frequency, and a liberality, as to the use to be made of them, that, under circum-

(1) See preface to Mr. Colebrooke's translation to Jagannatha's Digest, p. vi.

stances at all alike, cannot often have been paralleled, and can never have been surpassed. Such comity casts a lustre about learning, that doubles it merits. For the value of the service thus rendered,—to every one in the slightest degree occupied in Hindu jurisprudence, it must be sufficient to have said that the "Remarks," to which it applies, are Mr. Colebrooke's.

Of Mr. Ellis, late of the Madras Civil Service, who kindly supplied the series next to be noticed, it is necessary to say more, in proportion as he is less known. Alluded to in terms of respect, by the author of the History of Mysoor,(1) he never attained the rank of an authority, having died prematurely of poison, administered to him a few years ago, through mistake, by a native servant. But the offices he successively held, attaching to him the attendance of the most intelligent Hindoos, through their aid, and his own indefatigable industry, he succeeded in rendering himself a considerable master of their learning, and particularly of their law; a science, for which he may be said to have had a natural genius. Accordingly, the opinions in question, regarding, as they did, the customs, practices, course, and law of Southern India, and the judgments in the suits in which they had been given not having been communicated, it became convenient to submit them to the examination of Mr. Ellis,—by consent of all who knew him, the best acquainted at the time with the subject, in that part of our Indian possessions. A long intimacy with him rendered such a reference easy; nor did

(1) Preface, p. xvi.

he disappoint the expectation with which it was made, though accepted under circumstances of some disadvantage. His "Remarks" were all penned by him during an excursion on the river Hoogly, without the benefit of books; which will account for their being, in few instances, accompanied, like Mr. Colebrooke's, with a citation of authorities. And here it may be noticed, that, where dissent is expressed by him, it has regard, not to the corresponding "Remark" of Mr. Colebrooke, but to the opinion of the Pundit, Mr. Ellis never having seen Mr. Colebrooke's "Remarks;" and that, where the effect of any of Mr. Ellis's has been simply that of coincidence with Mr. Colebrooke, Mr. Ellis's has been suppressed, Mr. Colebrooke's not being considered as requiring confirmation.

The only remaining observations of the kind, to be specially distinguished, are those of Mr. Sutherland of Bengal, the nephew of Mr. Colebrooke; a Sanscrit scholar, and an eminent Hindu lawyer; of which the notes and accompaniments to his translation of the *Dattaca Mimansa*, and *Dattaca Chandrica*, afford abundant proof. The author has, in correspondence, (commenced previously to any personal acquaintance,) experienced from him all his kinsman's liberality; while his "Remarks" annexed to some of the "Opinions," shew, in conjunction with his published work, that it is not in that estimable quality alone that he resembles him, but in learning and judgment also; leaving one to regret in them only, that they are so few.

With all his opportunities, and much as the author's occasions had led him to cultivate them, yet, unacquainted with the Sanscrit language, in which, (to use the expression of Sir William Jones,(1)) "the Hindu laws are for the "most part locked up," great would have been his presumption, in offering to others, in any form, his ideas on the subject, had he not first taken the most effectual means in his power, of bringing them to some practicable test. For this purpose, unable to reach the *fountains*, it became him at least, toward correction and verification, to avail himself of what he conceived to be the safest, and best *channels*. The work brought to a close, according to his then existing means, he, in the summer of 1823, printed a few copies, the greater part of which he forwarded (interleaved) for examination, to friends at the several Presidencies of Bengal, Madras, and Bombay; with an earnest solicitation for criticism, and every species of remark, calculated to render it not unworthy its purpose. This has retarded the publication, without having, in the degree that was expected, answered the purpose for which the transmission was made;—the author having received, in this long interval, no return from Bengal, and two communications only from Bombay. But the delay is not to be regretted; since it has afforded him ample time for revision, which he hopes has been employed in improvement, from sources of his own; while it has not been unproductive, as to its direct object. To the present Chief Justice of Bengal, (2) (at the time one of

(1) Preface to translation of the Digest, p. vi.

(2) The Honourable Sir Charles Grey.

the puisne justices of the Supreme Court at Madras,) he is, in consequence of the measure that was pursued by him, indebted for some valuable suggestions as to the arrangement, and some useful remarks on the details of the work. The late Chief Justice of Madras, (2) in returning the copy that was placed in his hands, in addition to remarks, such as might be expected from his high legal character and station, accompanied it with notes of cases in Hindu law, determined in the Court in which he was presiding, since the time when the author quitted India. And to William Oliver, Esq. and John Fryer Thomas, Esq. both of the Madras Civil Service, and to Charles Norris, and John Pollard Willoughby, Esqrs., of Bombay, all four holding with credit offices in the judicial department of their respective Presidencies, he is under infinite obligations, for suggestions and corrections; every one of which, he believes he may venture to say, he has adopted.

In a professed compilation, like the present, the author has been careful to support every position advanced, by a specific citation; and, where this is wanting, the credit of what is laid down must be understood to rest, not upon any mere judgment of his own, but on the result of the extensive scrutiny, to which, previous to its present publication, it will have been submitted.

In the course of his communications, it has been suggested to him, to point out, more in detail than it is thought appears, what is obsolete; and how modern prac-

(2) The Honourable Sir Edmund Stanley.

tice differs from ancient law;—or, at all events, to warn the Student, by a general note, that the *lex non scripta*, is, in fact, often followed, where it is in direct opposition to the *lex scripta*. The latter is hereby done; but, beyond this, to notice the variation in every instance, as referable to the different provinces of India, would, in the actual state of our knowledge, and means, be extremely difficult and perilous. Such discrepancies must, in general, be left to be investigated, from time to time, in particular cases, as questions arise in different parts of the country; being to be regarded as the result of local custom and usage, growing up by degrees, extrinsically; and not to be necessarily included, in a treatise of general law.

With all the advantages that have been thus acknowledged, confident that a work of the kind cannot be expected to arrive at attainable perfection, without the combined aid of many lights, the author takes his leave for the present,—with the hope that these may still be afforded him, beyond what he has already received;—prompted herein by the same zeal, in the prosecution of a public object, that first stimulated the undertaking, and has since maintained in him the perseverance, with which it has been so far performed.

BATH, AUG. 1825.

IN THE FOLLOWING WORK,

The digest referred to, thus, *Dig.*, is Mr. Colebrooke's translation of Jagannatha's; Lond. ed. 8vo. 1801.

The initials, *C. E.* and *S.*, annexed to the references to the Appendix, denote respectively the names of Mr. Colebrooke, the late Mr. Ellis of Madras, and Mr. Sutherland of Bengal.

Where the *people* are spoken of, the term Hindoo is used — where any thing *belonging* to them, (as law) Hindu.

The Appendix referred to, at the bottom of the following pages, forms the Second Volume.

The other references are principally to the works named at length, and described in the Preface to the first edition, supr. p. xii.

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ADDENDA.

HINDU LAW;

PRINCIPALLY WITH REFERENCE TO SUCH PORTIONS OF IT AS CONCERN THE ADMINISTRATION OF JUSTICE, IN THE KING'S COURTS, IN INDIA.

ADDENDA.

According to an intention expressed, and a pledge given,(1) relative to a work entitled "Considerations on "the Hindoo Law, as it is current in Bengal," by the Honourable Sir Francis Workman Macnaghten, Knight, &c., it has been carefully examined; and, the result of that examination is now to be added. In adopting this method for the purpose, I have to repeat my regret, at not having received a copy of Sir T. W. Macnaghten's work in time, to have incorporated in my own, the doctrines it contains.—It is an extremely valuable one, to any one engaged in the study, or administration of the Hindu law. The author was himself administering it, when he compiled the work in question; being, at the time, one of the Judges of the Supreme Court at Bengal; for which reason, it is much that he could find the requisite leisure; and though, on this account, it is not arranged as he could have wished, it is full of

(1) See Hindu Law, Preface to vol. ii. p. viii.

important materials; introduced, and commented upon, in most instances, with observations, deserving the greatest attention, wherever the same points shall come to be discussed. It is the more valuable, that, so far as the author of "Hindu Law" knows, such of them as are derived from the records and proceedings of the Supreme Court at Bengal, are no where else accessible in print. The author last alluded to, now proceeds to make his use of it in this way; supplying, in some instances, the deficiencies,—in others, correcting—and, in others, confirming the doctrines of his own work, in the shape of "additions." In so doing, he is ready to confess, that they will stamp a value upon it, which it does not otherwise possess.

HINDU LAW, &c. VOL. I.

I.

Pref. to 1st Edit., p. xiii.—"*The Institutes of Menu,*" &c.

One of the Pundits of the Supreme Court of Bengal, justifying, to Sir Francis Macnaghten, one of the Judges, in a written paper, an opinion he had delivered, on a case referred to him,—said, "Decisions are not formed "solely by the texts of Menu; because, without the "assistance of commentators, his true meaning is not "evident," &c.—Considerations on, &c. p. 162.

II.

The same, p. xix.—" *In the course of the present work,*" &c.

"To those who have made the Hindoo law any part "of their study, it cannot appear strange that it is so "unsettled and contradictory. Many of the opposing "writers are, in point of credit, equal to each other; and, "in regardlessness of consistency, texts are adopted by "each for the purpose of sustaining his own particular "doctrine. The obsolete, is confounded with the acknow- "ledged, law. The context is often omitted, and passages "which ought to be relatively considered, are quoted as "if they were absolute and independent in themselves. "We cannot therefore wonder that so little satisfaction is "to be obtained from authority;—nor can we but lament "that some effort has not long since been made, to distin- "guish and separate those which are, from those which are "not, rules of action."—Considerations on, &c. p. 137.

III.

Introduction, p. 11.—" *And, while such shall continue to be our policy,*" &c.

"I am far indeed from desiring to disturb any fixed "principles, and much farther from wishing to introduce "any notions of my own in their place; but the unsettled "state of Hindoo law is universally complained of; and "I have persuaded myself that an attempt to produce "order out of the existing confusion, cannot but be in

"some measure useful."—To which may be added the reflections of the author, on some quotations by him from the Digest, which he says he gives, "not for the "purpose of instruction in any thing, except the useless-"ness of endeavouring to extract certainty from the "books of *Hindoo* law. Those (he continues) whose "duty it is to administer justice to the Hindoos, may "nevertheless read over their law books with some ad-"vantage; for, by a perusal of them, such persons cannot "but learn the necessity of caution, and the dangers "which beset them, when they may suppose they are "standing upon fixed and established principles."—Considerations on, &c. p. 106. 112.

IV.

Hindu Law.—Cap. I. p. 21.—" *Whereas, in the Bengal provinces,*" &c.

"I must not omit to mention that there are several "texts which put moveable and immoveable ancestorial "property upon the same footing; but the number and "weight of authorities are on the other side."—Considerations, &c. p. 251.—"It is desireable that the extent "to which a *Hindoo* in his lifetime, may give, or make "an unequal distribution of, his property, should be "ascertained.—I think it clear that he has a right to "dispose of his *self-acquired* property, whether *moveable* "or *immoveable*, according to his own pleasure—and "that he has the same right as to *ancestorial moveable* "property. With respect to *ancestorial immoveable* pro-

"perty, there seems to be much doubt. The gift of it "all to one son is certainly not authorized by any "of the *books* upon Hindoo law. Unequal distribution "may, nevertheless, be allowed—but we can hardly "accede to the principle, without knowing the limits "by which it is to be bounded. As they have been "defined by those who insist upon the right, it must "be admitted that discretion will become in a great "measure at least, if not entirely, a substitute for the "law."—Id. p. 242.—Speaking of a Hindoo's right to dispose of his own self-acquired property, according to his pleasure, as also ancestorial moveable property, "Both "rights indeed, (says the author) seem, in their exercise, "to be accompanied by moral restrictions."—Id. p. 246. —"It will be seen that decisions and opinions have "turned upon this single point—that '*factum valet*' has "overcome the law."—Id. p. 247.—Speaking again of the right to dispose of ancestorial immoveable property, at his own discretion, the same author says, "The ques-"tion, at present, is greatly perplexed, and I wish it "were as easy, as it certainly is desirable, to extricate "it from difficulties. I cannot conceive how this is to "be effected, with any thing in the resemblance of con-"sistency, but by recurring to the principle which "governed the earlier decisions of the *Sudder Dewannee* "*Adawlut*—and, admitting an unequal distribution of "such property, to be *immoral* and *sinful*, as it relates "to the distributor; holding, nevertheless, that his act "shall be valid and binding, as it may affect other par-"ties."—Id. p. 293.—"I now return to the question of

"a *Hindoo's* right to dispose of his ancestorial property, "by will, or by gift. In all views of it, we shall dis- "cover difficulties, and I do not, as I before observed, "see any mode by which we can be extricated from "them, but by adhering to the rule which has already "been acted on, and declaring that a gift of even the "*entire ancestorial immoveable* property to one son, in "exclusion of the rest, is *sinful;* but nevertheless *valid,* "if made."—Id. p. 297.

V.

Cap. I. p. 23.—"*The principle of factum valet,*" &c.

"In the books we seldom find a distinction between "acts which are *sinful* merely, and acts which are *void* in "themselves, clearly expressed. There is a general pro- "hibition as to all, and the expounders are to discrimi- "nate between those which ought to be binding in "morals, and those which are binding in law."—Considerations on, &c. p. 300.—"The maxim '*quod fieri* "*non debet, sed factum valet,*' is of general, if not uni- "versal application in the Hindoo law;—and depredation "upon property must necessarily be promoted by a "recognition of the principle; for the embezzler is free "from restraint, and the receiver protected against "retribution."—Id. p. 33.

VI.

Cap. I. p. 25.—"*Property acquired by a single man,*" &c.

"It is desirable that the extent to which a Hindoo, "in his lifetime, may give, or make an unequal distri-

"bution of his property, should be ascertained.—I think "it clear that he has a right to dispose of his self-"acquired property, whether moveable or immoveable, "according to his own pleasure; and that he has the "same right as to ancestorial *moveable* property."—Considerations on, &c. p. 242.—With respect to ancestorial *immoveable* property, &c.—vide supra, No. IV.

VII.

Cap. IV. p. 83.—"*The general principle*," &c.

"In the *Brahman*, *Khettry*, and *Boice* castes, a child, "whom it would have been incest to beget, cannot be "adopted. The son of a sister, or of a daughter, there-"fore, cannot be adopted, by a *Brahman*, *Khettry*, or "*Boice*. The son of a wife's sister may be adopted, "because the marriage of one man to several sisters is "permitted. The adoption of a brother's son is recom-"mended, in preference to the son of any other. "This, however, if the old law by which a *Hindoo* was "required to raise up a son by his deceased brother's "widow, be considered, will not be found inconsistent "with the general rule."—Considerations on, &c. p. 149. —"The son of a sister, or of a daughter, may be adopted "by a *Soodra*. As to the three superior classes, the rule "is, that they cannot adopt a son whom it would be "incest to have begotten; and conversely, that they "may adopt a son if without incest they could have "begotten him."—Id. p. 150.

VIII.

Cap. IV. p. 83.—" *And the exclusion seems to hold,*" &c.

"To the same effect."—Considerations on, &c. p. 171.

IX.

Cap. IV. p. 83.—" *And the sister's son,*" &c.

"The next case I shall mention, is one to which I "have before alluded—one, in which the adoption by a "*Brahmin*, of his *sister's* son, was declared valid. This "decision, was *manifestly wrong*—and opposed to *all* "authority, except the depositions of some *Pundits*, who, "by their testimony upon oath, led the Court into error. "If this decree is to be rejected as law, it ought at least "to be retained as a lesson; for it inculcates the danger "we incur, by abandoning ourselves to the guidance of "*Pundits*, if we wish to do justice between contending "parties."—Considerations on, &c. p. 166.

X.

Cap. IV. p. 84.—" *That if among several brothers,*" &c.

"Upon this particular point, the sum of all I have "been able to collect out of books, or from living autho- "rities, is, that in the three superior classes, if there "be *brothers of the whole blood*, a son of *one* of them, "will, *for religious purposes*, be the son of *all;* and that, "while this son exists, the childless brothers by the same "father and mother, need not adopt one for the per-

"formance of *sacred rites*. But that, in a *secular point* "of view, a male child is not considered as the son of "his father's brethren—and that to take the heritage "*as a son* of his uncle, he must be adopted; that, "*spiritually* considered, he confers benefits as a son, "upon his uncles; that, *temporally* considered, he does "not, as a son, derive any benefits from them—and that "the son of a brother is *recommended*, in preference to "all others, for adoption."—Considerations on, &c. p. 123.

XI.

Cap. IV. p. 86.—"*He cannot have two adoptive ones*," &c.

"From what has been already said, I conclude that "two men could not, at any time, have adopted the same "son."—Considerations on, &c. p. 136.

XII.

Cap. IV. p. 87.—"*They are directory only*," &c.

"The gift of an *only* son in adoption is absolutely "prohibited—an only son cannot be given or received "in adoption. The gift of an only son is considered to "be an inexpiable *piacle*. It is indeed said, that an "only son *may be so given*—but it might be said in the "same sense, that a man *may* perpetrate any wickedness "if he be content to forego all hopes of salvation, and "be condemned to everlasting punishment."—Considerations on, &c. p. 147.

XIII.

Cap. IV. p. 88.—" *In favour of the tenderest age,*" &c.

"Those who are against an extension of the age from "five to eight years, appear to have some reason on "their side. They say that a child cannot be taken "at too early a period of life, into adoption. That he "may be so taken at the moment of his birth. That "as he is to make one of his adopting father's family, "he ought to enter it with a mind completely unoc-"cupied, and ready to receive all the notions, impres-"sions, and peculiar sentiments, of that family, of which "he has become a member. That he ought not to con-"tinue with his natural family until his affections are "fixed, and cannot be transferred to the family adopting "him. This is all true, but we must recollect that "adoption is a voluntary act, and that it is in the option "of the adopter to take, or not to take, a son under such "disadvantages."—Considerations on, &c. p. 145.

XIV.

Cap. IV. p. 91.—" *No adoption of one who is married,*" &c.

"A Hindoo cannot be adopted after his marriage. "This rule applies generally to all the classes."—Considerations on, &c. p. 141.

XV.

Cap. IV. p. 92.—" *Be this as it may,*" &c.

" *Soodee Sing* left widows, and, as their attorney, *Kul-* " *lean Sing* instituted this suit. *Soodee Sing* a short time " before his death made a *verbal declaration,* in the " presence of several persons, that *he adopted* the *De-* " *fendant Bholee Sing,* but *no religious ceremony* was " observed on the occasion. After the death of *Soodee* " *Sing, Bholee Sing* performed the obsequies, and was " acknowledged as the heir, and a turban was bound " round his head by direction of the eldest widow, in " token of his succession.—Upon these facts being esta- " blished, Bholee Sing had judgment in the *Zillah* Court " of *Tirhoot.*—In the provincial of Patna, this judgment " was affirmed.—There was then an appeal to the *Sudder* " *Dewannee Adawlut,* where it was insisted that *sufficient* " *forms to constitute adoption had not been observed.*— " The Pundits declared that the adoption was valid.— " The above, it is true, was a *critrima* adoption; but " *no religious ceremonies were observed*—and the parties " adopting and adopted *ought to have previously bathed* " according to the strictness of law."—Considerations on, &c. pp. 126—128.

XVI.

Cap. IV. p. 96.—" *Case of the Raja of Nobkissen,*" &c.

See Considerations on, &c. pp. 228. 230. 356.

XVII.

Cap. IV. p. 97.—" *Its effect is,*" &c.

" The son, who is taken for adoption, becomes an alien
" from his own natural family. He foregoes every
" benefit to which he was entitled by his birth. He
" dissolves every tie by which nature had bound him to
" his kindred. He is renounced by his own father, when
" he is made the son of another. In his paternal house,
" every relation, civil, social, and sacred is gone—and
" although contingencies might have put him in pos-
" session of ten times the wealth which he could have
" hoped for from his transfer, his adoption will operate
" as a forfeiture. These are great sacrifices, and made
" for the adopter's advantage—who is relieved from the
" reproach of orbation,—who gains respectability among
" his neighbours—all the comfort that could have been
" expected from a son of his own in this world—and
" the means of attaining future bliss after death. In
" this view of the case, I cannot but think that the boy
" who is taken for adoption ought to be considered as
" a *purchaser;* and, in the case of *Gopeemohun Deb v.*
" Rajah Rajcrishna, he seems to have been looked upon
" in that light by the Court. For an issue was directed
" to try the execution of an instrument, by which *Rajah*
" *Nobkissen* was alleged to have made a settlement upon
" the boy whom he was about to adopt—and the issue
" might have been nugatory, if it had not been pre-
" liminarily determined, that a gift in adoption was a

"*good* and *valuable* consideration, or at least a conside-"ration sufficient for the support of a promise."—Considerations on, &c. p. 229.

XVIII.

Cap. IV. p. 97.—"*Lineally and collaterally,*" &c.

"There are various and contradictory opinions con-"cerning the rights of an adopted son (Dattaca). Some "say that he is *heir generally* to the *kinsmen* of his "adopting father, and others that he is heir to the *adopt-*"*ing father*, but *not to his kinsmen.*"—Considerations on, &c. p. 128, et seq.

XIX.

Cap. IV. p. 98.—"*Subject to the existence of a son born,*" &c.

"If a son be adopted, and the adopting father after-"wards have a son of his body; the adopted son shall "take *one-third* of his (the adopting father's) estate; and "the begotten son *two*-thirds. This is the proportion, "in which I am satisfied, they are entitled to share.—"The rule, as I believe it to be, is, that the begotten "son or sons, shall take one share more than the son "by adoption—or rather, that the begotten son, or sons, "shall take two shares, and the adopted son one share. "Thus, if one son be begotten after the adoption, he "shall take two shares, and the adopted son one share, "of the estate. If two sons be begotten after the adop-

"tion, the whole estate shall be divided into five parts, "of which the adopted son shall take one, and the "begotten sons two each. If three sons be begotten "after adoption, the estate shall be divided into seven "parts, of which the adopted son shall take one, and "each of the begotten sons two. This rule will apply, "whatever number of sons may be begotten by a man, "after he shall have taken one in adoption. I have had "much trouble in endeavouring to ascertain the law "upon this point, and the above rule is the result of my "researches." Considerations on, &c. p. 150.—"I shall "here notice the proceedings which took place upon "*Rajah Nobkissen's* death, he having adopted, and after- "wards having begotten, a son. There was not a formal "decision—but the opinion of the Court was well "known to have been, indeed it was declared to be, that "a man who had adopted a son, was not at liberty, by "his will, to cut off the adopted son from that propor- "tion of the estate, to which, in virtue of his adoption, "he was entitled by the *Hindoo* law.—I never heard "that an adoption imposed the necessity of practising "economy upon the adopting father—or that it was to "prevent him in his expenditure, from exceeding his "income—or that it was to interfere with the exercise "of his own pleasure, in the use, or in the abuse of his "property. In these respects, I have never heard it "surmised that a man was to be a less free agent, after, "than before, he had adopted a son—but when he comes "to a division of his fortune among his family; whether "by will, or by distribution in his lifetime, I very much

" doubt his power of lessening the share, to which his " adopted son is entitled by law. I incline to think that " the son by adoption has rights as a *purchaser*, and that " they cannot be defeated by his adopting father.*— " Admitting that a father may make an unequal distri- " bution among his own begotten children, it does not " follow that he can diminish the proportion of an " adopted son. Their claims stand upon different " grounds. If the begotten son has rights, they are " confined to *ancestorial* property. If the adopted son " has rights, they are extended to the property that has " been self-acquired."—Id. p. 228.—"The son who is " taken for adoption," &c.—vide supra, No. XVII.

XX.

Cap. IV. p. 99.—" *A criterion of title*," &c.

" It will appear, that this *distinction*, by which all " differences between the holy saints are to be recon- " ciled, is now laid aside. We cannot indeed conceive, " how it ever could have been more than theoretic; or " that in practice it could have furnished a criterion, " by which the claims of competitors could have " been rationally decided."—Considerations on, &c. pp. 121—162.

* Supr. p. 14.—xvii.

XXI.

Cap. VIII. p. 171.—" *The manner of doing this is discretionary,*" &c.

In Bengal the course is by reference to the master, upon which the author of Considerations, &c. says, " It " is thus evident that a maintenance, if not voluntarily " yielded, may be enforced by law,—and I conceive it " will follow, that widows having a right to maintenance, " may restrain the representatives of their husbands from " wasting, or making away with, their estates—or at " least compel the possessors under such circumstances, " to give security for the due payment of a suitable " maintenance."—Considerations on, &c. p. 62.

XXII.

Cap. IX. p. 194.—" *Preferences, as well as exclusions, requiring to be justified by circumstances,*" &c.

As in the case on the will of Durpnarain Surmono, in Bengal; where the testator, possessed of a very large property, self-acquired, had expressed himself, as follows: —" As my eldest son Sree Radhamohun Baboo, and " third son Sree Kishnamohun Baboo, have discarded " their *gooroo* (spiritual teacher,) and drink spirituous " liquors, and have threatened to murder me, I have " discarded them, and debar them from performing the " ceremonies of burning my body, and Sraddha."—Considerations on, &c. p. 249. Upon which the author says, " There cannot indeed, be a doubt, upon any principle

"ever contended for, but that the person who was "testator in this case, had a right, by *partition in his* "*life time*, to make the allotment of his property, which "he made of it by will."—Id. 348.

XXIII.

Cap. IX. p. 204.—"*A division, living the mother*," &c.

It appears that, by the law, as prevalent in Bengal, the widow, where there are sons, shares on a partition, though she cannot call for one. But it is out of the patrimonial wealth, and its increase, that she is entitled, not out of what may have been subsequently acquired; and this, upon partition among her own sons, and their descendants only; being entitled to no more than maintenance, where it is made among the sons of her husband by another wife.—Considerations on, &c. pp. 45. 54 and 57.—And whether she takes in right of her husband, on default of male issue, or on partition among her sons, it is settled there, that she takes only an interest for life; and this, whether the property consist in land, or moveables.—Id. pp. 32. 34. 39. 42. 45. 73. 93.

XXIV.

Cap. IX. p. 208.—"*Idols*," &c.

See several cases, in which bequests to superstitious uses, and in support of idols, have been sustained by the Supreme Court of Bengal. Considerations on, &c. p. 323. 344. 355. and particularly p. 371 to 376, in

which, by the will of Rasbcharry Surmono, a Bengal Hindoo, out of an estate amounting to 335,501 rupees, the Court ordered the sum of 226,250 rupees, or upwards of two-thirds of the whole, to be applied to religious purposes, as the testator had directed by his will; including the sum of sicca rupees, 43,750, for the purpose of paying therewith the expenses to be incurred, in feeding 100,000 Brahmins, pursuant to the same.

XXV.

Cap. IX. p. 225.—" *The law presumes joint tenancy*," &c.

" The state of every Hindoo family, is that of a *union* " in *board*, in *property*, and in the *performance of* " *religious ceremonies*. Families thus united, may sepa- " rate, as to *board*, *property*, *or the performance of* " *religious ceremonies*—or as to any two of them; and " continue united, except in so far as the separation shall " take place. . . . . . . *Menu* seems to recom- " mend a separation in the performance of religious rites, " since (he says) religious duties are multiplied in sepa- " rate houses; their separation is, therefore, legal, and " *even laudable*."—Considerations on, &c. p. 54.

XXVI.

Cap. IX. p. 233.—" *Upon a re-union of any of the separated parceners*," &c.

"After separation, and a partition actually made, " families may be again united. This, however, is an

" event which seldom happens. I do not know an " instance of it, and the Supreme Court *Pundits* inform " me that none has ever fallen within their knowledge." —Considerations on, &c. p. 107.

XXVII.

Cap. X. p. 244.—" *It being expected she should live,*" &c.

" I do not desire, and I believe I could not obtain, any " advantage from those precepts, by which a *Hindoo* " woman who has lost her husband, is enjoined to an " ascetic life, by which the use of ornaments is forbidden; " and that which is most spare, and most homely in diet, " and in clothing, prescribed;—for if she should be " inclined to voluptuousness, we might be told of her " freedom from secular restraint—that she was sinful in " transgressing, but had nevertheless a right to trans- " gress."—Considerations on, &c. p. 34.

XXVIII.

Cap. X. p. 246.—" *That she should be under some control,*" &c.

" That it has been usual to give a widow, or a mother, " *possession* of the property to which she may succeed, " must be admitted. . . . . . . Yet the right of " her husband's heirs to it after her death, is indisput- " able, and the justice of restraining her from waste, is a " necessary consequence of this right.—What then is to " be done? Possession will enable her to do all the mis-

" chief, before any restraint can be applied.—It must not " be forgotten, that the *discipline of Hindoo* women, who " have lost their husbands, has been greatly relaxed. For- " merly, a widow lived with the relations of her husband; " with the very persons entitled to the property after her " death. This was an effectual control over the expen- " diture, and a sufficient security for the expectants. " We are still told, that the family house is her *proper* " abode; that she *ought* to live with her husband's " relations; but that she *may* live *elsewhere* without " penalty, provided she does not change her residence " for *unchaste purposes.* Her purposes are known to " herself alone; and her practices will be regulated by " her inclination. Freed from restraint,—surrounded by " parasites,—possessing wealth,—exposed to tempta- " tion,—unused to liberty,—ignorant of the world,—and " conceiving all happiness to consist in the indulgence " of her own immediate desires; can it be hoped or " believed, that she will prove a faithful trustee for the " heirs of her husband, or that they can have any thing " in the nature of security for a succession to their " rights ?"—Considerations on, &c. p. 94.

XXIX.

Cap. X. p. 247.—" *The restriction however,*" &c.

Query.—Whether by the law, as current in Bengal, the restriction do not extend to moveable, as well as to immoveable property; and this, howsoever derived; unless an exception is to be made, with respect to her

share, on partition among her sons.—Considerations on, &c. pp. 12. 16. 18. 23.—But, even as to this, the same author, in a subsequent page, says, "I have been unable "to discover the authority, (and I believe there is not "any) upon which a distinction between *moveable* and "*immoveable* property, coming to a widow by the death "of her husband, or to a woman by partition made "among her descendants, can possibly be supported;— "nor do I believe there is any authority for saying, that "a female, who so takes, shall have more than a life "interest in either."—Id. pp. 32. 36. 42.

XXX.

Cap. XI. p. 258.—"*To try them by the provisions of the Hindu law, with respect to gifts,*" &c.

The right of Hindoos to give away certain property while they live, is unquestionable; but that of disposal by will has not been expressly conferred upon them by their law.—"It has now (if a series of decisions in the "Supreme Court can confirm it) been confirmed by "authority; yet that Court is not competent to make "law—on the contrary, it is enjoined to administer their "own laws to the *Hindoos.*—A power to direct the "distribution of their wealth after death, has been "sanctioned. This, however, does not, and cannot, "imply, that property, over which they had not a con- "trol when they lived, may, upon a cessation of life, "be disposed of according to their directions.—It is there- "fore desirable that the extent to which a *Hindoo*, in his

" lifetime, may give, or make, an unequal distribution " of his property, should be ascertained."—Considerations on, &c. p. 241—et vide supra, No. VI.

XXXI.

Cap. XI. p. 257.—" *In favour of some artful Brahmin,*" &c.

Vide supra, No. XXIV.

XXXII.

Cap. XI. p. 259. Note (*)—" *See a curious passage expressive of the horror of litigation,*" &c.

" In May 1815, the several parties having had experience of the expense and delay of a reference in the " Master's Office, agreed to stop all further proceedings, " and to come to an amicable settlement among them- " selves.—Meetings were held, and agreements were " executed, but the result was unsatisfactory, for after " sacrifices made or offered by *K'hunjunnee Dassee* to the " peace of her family, it was found that the spirit of " litigation operated more powerfully than the interest of " parties concerned; and, as the property was large, " perhaps it was thought that more money might yet be " afforded for the purposes of vexation." Considerations on, &c. p. 70. " Parts of this case have been noticed " before; but, as taken altogether, it appears calculated " to throw considerable light upon several points of " *Hindoo* law, and, as it is demonstrative of the vexa- " tious spirit, which any disagreement in a family of

" *Hindoos*, is sure to engender and to perpetuate, I have " given the proceedings in a more detailed and connected " form.—The first bill was filed on the 14th of October, " 1808, &c. &c. . . . . The contest " continues, the spirit of the combatants is, I believe, " unabated; and the duration of this strife will, I pre- " sume, if possible, be proportioned to the funds of the " family." Id. p. 78.— . . . . "A " family dispute among *Hindoos* is seldom to be termi- " nated by arrangements among the disputants them- " selves."—Id. p. 87.

XXXIII.

Cap. XI. p. 262.—" *That separate acquisitions*," &c.

"I think it clear that he has a right," &c. Vide supra, No. VI.

XXXIV.

Cap. XI. p. 263.—" *Or in the Sudder Dewanny Adawlut*," &c.

"I do not know that any question, founded upon a will, " has, ever come before the *Sudder Dewannee Adawlut*. " In the *Mofussil*, wills may not have been often made " by the natives of *India*; but, in *Calcutta*, if there be a " large property to dispose of, intestacy has, of late years, " been uncommon.—In the Reports of the *Sudder* " *Dewannee Adawlut*, and in a 'Remark' upon the case " of *Eshanchund Rai v. Eshorchund Rai*, it is said that

" the decision 'has been received as *a precedent*, which " *settles the question* of a father's power to make *an actual* " *disposition* of his property, even contrary to the injunc- " tions of the law, whether by *gift or by will*, or by " distribution of shares.'—The above case, was one of a " *gift* made by a father in his lifetime; and it *seems to* " *have been* afterwards over-ruled.—If a father has not " the right of making such a *gift* at all, it must follow " that he cannot make such a one by *will*. But I do not " find any thing in the *Sudder Dewannee Adawlut* Reports, " from which we can infer a denial of the right to " dispose by will, where there is a right of disposal *by* " *any means*, in the possessor; and may we not suppose " that the *dictum*, so far as it relates to a power of " making *wills*, still remains undisturbed? The mention " of a will was gratuitous, and may be received as an " independent proposition, importing that a *Hindoo's* will " shall be operative after his death, as his gift would have " been, if made by him in his lifetime, and that he may " dispose by will, of such property, as he can make any " disposition of by his own law.—It might be extremely " injurious to the natives of this country, if one law " with respect to them should prevail in the Supreme " Court, and another in the *Sudder Dewannee Adawlut*."—
Considerations on, &c. p. 316.

XXXV.

Cap. XI. p. 266.—" *Among these may be noticed (in* 1807) *that of the Mullicks,*" &c.

The decree of the Court was prefaced by the following declaration, viz., "That by the *Hindoo* law, *Nemychurn* " *Mullick* deceased, in the pleadings of this cause men-" tioned, might and could dispose by will of all his " property, as well moveable as immoveable, and as well " ancestorial as otherwise."—The decree is stated to have been affirmed on appeal to the King and Council. But, *Quere,* how far the above declaration was meant to be affirmed; admitted, as it is, not to have been necessary to the decree.—See Considerations on, &c. p. 340, et seq.

To stop here, with extracts from "Considerations on " the Hindoo Law, as it is current in Bengal."—The latter of them, respecting, as they do, the wills of Hindoos, lead to a resumption of the subject, as discussed in the chapter on "The Testamentary Power;" being the XIth of the 1st vol. of the work, to which these "Addenda" are intended to refer. And the question upon them finally is, Is it fit, in defiance of the letter and spirit of our Acts of Parliament, and Charters for India, to have engrafted upon their law of Inheritance, as respects these people, a mode of alienation, unknown to them, otherwise

than through us; subversive of those rights, which we were, in a particular manner, enjoined to maintain: while it leads, at the same time, to expensive and interminable litigation,—with encreased temptation to fraud and perjury?—Yet this is what has been done at Bengal; by which means, full effect has there been given to that most pernicious maxim of, *factum valet, quod fieri non debuit.* For there, as it would seem, the owners of property, (Hindoos) real, or personal, ancestorial, or self-acquired, deal with it as they think proper, as against the claimants upon it after their death; disposing of it at their discretion, contrary, in innumerable instances, to the provisions and intention of their law, by an instrument, for which their language has not a name;—insomuch that, in Calcutta, wherever there exists a large property, we have authority to say, that "intestacy has, of late years, been uncommon." (1) Not that it is of late years, that the innovation there commenced.—So far as appears, it took its origin in the auspicious time of Sir William Jones, and Sir Robert Chambers;—the earliest determination of the Court, in favour of such an instrument by a Hindoo, appearing to have been sanctioned by the opinion of their then Pundits, to the effect, as already stated. (2) But, to the value of such opinions, Sir William Jones was among the first to bear testimony, when he declared, "that he could not, with an easy conscience, concur in "a decision, merely on the written opinion of native "lawyers, in any case in which they could have the

(1) Considerations on, &c. p. 316. Ante, No. XXXIV.
(2) Hindu Law, Vol. I. p. 263.

"remotest interest in mis-leading the Court." (3) Of course, the Court had other grounds for their decision. The doctrine derived, comparatively, but little countenance from the *Nuddea Case*, (4) determined in the Sudder Dewanny Adawlut of Bengal; that case proceeding, as it did, upon very special circumstances.

If, as is asserted, (5) there is, in the law of Bengal, nothing, as *inter vivos*, to restrain a Hindoo, in the disposal even of ancestorial immoveable property, much less of personal chattels, held by whatever title,—or of immoveable property, self-acquired, the question will be, whether there be any thing to hinder its being done by will?—The difference between alienation by will, and by gift *inter vivos*, though to take effect not till after death, is obvious and immense; and has been already sufficiently considered.

But, to put an end to discussion on the point, a case before the Supreme Court at Bengal has been referred to, (6) in which that Court being said to have expressly declared, that a Hindoo Testator "might, and could dispose by will of all his property, as well moveable as immoveable, and as well ancestorial, as otherwise,"—it is added, that, upon an appeal to the King in Council, the decree was affirmed; upon which it is said, "Here, "then, is a decision in the dernier resort; and, if that is "not, nothing can be conclusive."—It being admitted at

(3) Pref. to Colebr. Dig. p. vi.

(4) Hindu Law, Vol. I. p. 263.

(5) Considerations on, &c. p. 319.

(6) Id. p. 297.

the same time, that the decree turned on the *construction* of a will—how far it was the intention of the Court of the King in Council, by the affirmance relied upon, to establish the validity of Hindu wills, as sanctioned by the Supreme Court at Bengal, it is not for these pages to say. If nothing was farther from its intention, the inference of conclusiveness vanishes.

Be this, as it may, in reviewing the question of their validity, it must not be forgotten, that many decrees of that high Court (the Supreme Court at Bengal) have declared it; and that the titles of many families to their property must now stand on such decrees. How far therefore their validity can be now disputed, in the ordinary course of judicature, need the less to be considered, it being competent, at all events, to the legislature, should it so think fit, by its interposition, to stop the currency of the evil; without prejudice to interests that may have been generated in its progress, and which it would be inexpedient to disturb. It can scarcely be maintained as proper, that, (our Acts of Parliament and Charters not so requiring,—but the contrary,) there should continue to prevail, as referable to the same people, and subject, one law in the Supreme Court, another in the Sudder Dewanny Adawlut; one for the Presidency, another for the interior. This at least is not for the credit of British judicature.

But, admitting the Bengal maxim of *factum valet, quod fieri non debuit*, to have the effect there of establishing in the owners of property, among the Hindoos, an un-restrained dominion over it, to be

exercised by them in any way they may think proper, it being certain that no such principle obtains to the Southward,(1) it is for the Courts of Madras and Bombay to consider, upon what ground the use of wills by Hindoos there can be justified;—it being clear that, for these, the practice of the correspondent Court at Bengal forms no available precedent.

With these observations, I take my leave of an ungrateful subject; in the prosecution of which, but little assisted, or encouraged, I am but too conscious that I shall have failed in producing more than a very imperfect essay. If such a writer as Cicero felt constrained to say, *alios aliquando satisfacio, me ipsum nunquam satisfacio*, the declaration of the great Orator, in its latter branch, may, without danger of his being suspected of affectation, be avowed by the author of the present work; of which its best fruit would be, might it lead to the production of a better, by one more competent to the undertaking;—by some one, on the spot, possessing, or creating for the purpose, the requisite leisure; versed in the Sanscrit, as well as in the law in question; having recourse, not only to the best authorities in the originals, but to local usages also, to be collected by persons qualified for the purpose, wheresoever such usages prevail, superseding the written law;—the author taking along with him every assistance from Pundits, with

(1) See Hindu Law, Vol. I. p. 24.

care not to be misled by them;—by one, lastly, in a situation to solicit with effect, if not to command, the advice and correction of scholars, and jurists, in every part of India. To a work of the kind, so to be undertaken, the author of the present would be content to be considered as having been acting as a sort of pioneer,—clearing the way, and laying open the prospect;—the road, for any thing that shall have hitherto been done, remaining still open, to be travelled with advantage, by whoever, with competent pretensions, shall have the virtuous ambition, uninfluenced by interested motives, to be regarded, for the benefit of the Hindoos, as the future Blackstone of the East.

T. A. S.

Edinburgh,
March 10*th*, 1830.

INTRODUCTION.

It is proposed, in the following work, to exhibit an outline of Hindu law, so far as it may be in use, in administering justice, to the Hindu subject of British India, in the King's Courts erected at the Indian Presidencies. In developing the design, it will be convenient, first, to specify the parts of that law, which do not enter into it; and then to sketch out the arrangement, that has been adopted for carrying it into effect.

1. The government of India, so far as that country has been reduced to our power, resting, as it does, upon British institutions, upon instructions from the authorities at home, or upon the laws of England, as communicated by Charters, founded upon Acts of Parliament, with a partial reference only to Native Codes, —such portions of these latter as explain and enforce what we consider to be objects of *constitutional* law, can never come into discussion in any of the above courts. Public office of every description in British

India is held exclusively by British, with the exemption of some subordinate ones; in the discharge of which latter, the Native, having entered into our service, is answerable to us, and to be judged of, like ourselves, not by his own, but by our law.(1) This observation excludes from our view farther, in a treatise like the present, professedly limited, the wide field of all that belongs to persons standing in a *public* relation; comprised, in part, with reference to the Hindoos, in the seventh chapter of the Institutes of Menu. Upon a distinct ground, we have nothing to do with their *penal enactments;* which, it is probable, have been thought to be capricious, or cruel, in too many instances, to be fit to be adopted, as the measure of retributive justice, in the King's Courts; even as against the Hindoo himself, whose ordinances they are. They are minutely detailed by Menu; who sums up all, by exalting to "the mansion of Sacra, that king, "in whose realm lives no thief, no adulterer, no de-"famer, no man guilty of atrocious violence, and no "committer of assaults."(2)

Neu quis fur esset, neu latro, neu quis adulter.

In the Company's Courts, as dispersed over the interior, (those dependant on the government of Bom-

(1) Vencata Runga Pillay v. East India Company; Notes of Cases at Madras, vol. p. Ed. of 1827.

(2) Menu, ch. VIII. v. 386.

bay excepted), the Mahomedan penal law, having been established for the Hindoo by the Mahomedans, was retained by us;—the Bengal government contenting itself with modifying it in particulars. Under the Presidency of Bombay, Hindoos and Mahomedans are tried according to their respective codes, accommodated in a certain degree to British ideas; while the Parsees at the same Presidency are subject in criminal, as well as in civil cases, to the English law; and, in civil ones, to appropriate usage and customs, derived in many instances from the Hindu; they having, properly speaking, no law of their own.(1) The *practice* also of Courts, as regarding the forms of action, and modes of proceeding, together with what appertains to their jurisdiction, is foreign to this work;—the end of which is, to ascertain and elucidate such doctrines of the law in question, as apply to the subjects of suits instituted in the English Courts with reference to it; not to point out how they are to be framed and conducted. And the same may be said of the *canons of evidence*, and rules for determining the *competency of witnesses*,(2) upon both which, as upon the matters last before alluded to, the Hindoo law is copious and minute; and, it may be added, in general,

(1) Vid. Letter C.—post, p. 326.
(2) Menu, ch. VIII. v. 61, et seq.
Syed Ally v. Syed Kullee Mulla Khan; Notes of Cases at Madras, vol. . p. . Ed. of 1827.

sensible. But, its provisions in these respects are, in the Courts of the King, superseded by his instructions, as conveyed in the Royal Charters; and, in those of the Company, by the Regulations under which they act. At the same time, it is to be observed, that important questions sometimes arise out of the adaptation of English process to suits between Natives; and rigour, bordering upon injustice, would be but too often the consequence of adhering strictly to forms of our own, not consonant to their feelings and usages; to obviate and provide against which is, from time to time, the province of our Courts, exercising therein a sound and careful discretion; and this, in instances of frequent recurrence, by rules expressly framed and promulgated for the purpose; it being the evident intention of the "Charters" and "Regulations" alluded to, that where the Native alone is concerned, the attainment of substantial justice should be rendered easy to him; and this, as far as practicable, according to the means that would be adopted, had the suit been brought forward in a Native Court.

So much having been premised, and it being remembered, that Contract and Inheritance are the two titles, upon which it is prescribed by the Royal Charters, that, whenever questions upon either of them arise, the Natives at our Presidencies are to have the

benefit of their own law, it is to these two subjects chiefly, that the following attempt at arrangement and elucidation is intended to be confined; and this as concerning principally the King's Courts, exercising jurisdiction at our three superior settlements in the East, of Calcutta, Madras, and Bombay. For the title of Inheritance, it is, in Hindu Law in particular, a comprehensive one, including some collateral ones;—and, in investigating a claim, whether of it, or of Contract, incidental questions will occasionally so mix, as to be inseparable; thus rendering indispensable a knowledge of the Native law, upon the point that is incidental only; since, where the principal is so combined, it would in many cases be incongruous to be determining the one, without reference to the appropriate code for the other. This consideration will give a scope to these elements, beyond the exigency of the two specified titles, strictly considered; more particularly as the Charters alluded to inculcate, in administering their powers, a special regard to the *constitution and usages of Native families.*

In the disquisition intended, then, an account of *property* in general, as it exists, and is considered among the people in question, would seem to challenge attention, as the first subject of inquiry; being as it were, the *substratum,* of most of the others

that are to be discussed.—*Marriage* offers itself the next;—that institution, whence a well known writer([1]) notices Plato to have, "with great judg-"ment, directed his legislator to take his stand;"—and on which, combined with that of *property*, as constituting together the foundations applicable to the whole order of civil life, a living, and eminent jurist of our own, has disserted, with a wisdom worthy the subject, and expatiated with a splendour of eloquence, that Plato,—had England, instead of Greece, been his country, had not disdained to own.([2]) Marriage giving rise to the *paternal relation*, this naturally succeeds in the order of subject; to which belongs the power and obligations of the father, with the condition, not of his children alone, but of other collateral and subordinate connexions;—including the state of *Slavery*.—But, the married pair may fail to be parents; a contingency inherent in too many of their marriages; in which the age of the male is often not only out of all proportion to that of the female, but excessive, for the primary purpose of the union.

(1) Taylor on Civil law, 4to. p. 264.

(2) "Discourse on the Study of the Law of Nature and Nations;" by Sir James Macintosh;—an exquisite tract; which, having become scarce, has been lately re-printed. See p. 40, et seq. See also "Sketch of the Inter-National Policy of Modern Europe," &c. By the Hon. Frederick Eden, p. 25. Also Dr. Croke's Introductory Essay, p. 4, to his Report of the Case of Horner v. Liddiard.

This consideration, as referable to the indispensableness of a son, to perform obsequies, and, discharge his ancestor's debts, has led to the expedient of *adoption*; a substitution in daily use, and of special import, as connected with inheritance. The above titles disposed of, and supposing the property of the father not to have been *divided*, (as it may be, among his sons, in his lifetime,)—its *descent*, with the *disqualification* of heirs, and the *charges* to which, when not disqualified, they are liable;—these may be regarded as constituting the abstract idea of Inheritance; being (as already intimated) one of the two great subjects of Hindu law, (that of Contract being the other,) which the Charters of Justice for India have expressly reserved, in extending, so far as they do extend, the authority of the English law over the Native;—imposing it on the Courts, so erected, in administering these subjects, to adjudicate upon them, not as in other cases, according to our law, but according to the law of the parties, as they may happen to be, Mahomedan, or Hindoo. Nor, without a departure from every Hindu authority, on the law of descent, can that of *partition* be separated; being the right that sons have of eventually inheriting, as it were, in the life of the father; contrary, in some degree, to our maxim, of *nemo hæres est viventis*;—or, the inheritance hav-

ing vested by his death, settling as it may be agreed their mode of enjoyment.

Death giving rise to new families, the course that has been sketched returns upon us in other marriages, with similar consequences attending them; so that the plan of what is proposed here to be discussed is brought nigh to a close. It remains, however, to notice the state of *widowhood;* which forming a special feature in the law of inheritance, is otherwise too remarkable, not to be distinctly considered. Nor can the *testamentary* power be with propriety passed over in silence, established, as it is, at one of our Presidencies, and in exercise at the others; though unknown to the Hindoo, prior to the intercourse of Britain; and, though, wherever it is allowed to have effect, by force of the will of the testator, it operates to supersede the legal, and rightful claims of inheritance.

Thus has the natural history of a Hindu family, through the changes and contingencies that may happen to it, in its progress, from its origin in marriage, to its absorption (as it were) into a new one, by the death of its head, suggested an arrangement, comprehending a succinct view of nearly whatever may be practically useful to be referred to in Hindu law, as it exists to be dispensed by us, whether at the different Presidencies under the Royal Char-

ters, or, so far as it goes, in the Courts established in the Provinces, by the authority, and subject to the regulations of the British organ for India, the United East India Company.

With regard to CONTRACT, it forms a separate consideration, distinct from any of those, of which the order has been unfolded. Reflecting how much the resolution of every question of the kind depends in all countries upon the dictates of reason and good sense, rather than (as in cases of inheritance) upon conventional rules, deduced often from localities, as they concern religion, manners, and habits, and resting for their efficacy upon authority—what is peculiar respecting it in the Hindu law, will, in the discussion of this title, be alone selected and stated. Consonant to this enumeration, the whole will be comprehended under the following chapters, viz.:—I. On Property in general.—II. On Marriage.—III. On the Paternal Relation.—IV. On Adoption.—V. On Slavery.—VI. On Inheritance.—VII. On Disabilities to Inherit. And, VIII. On Charges upon the Inheritance.—IX. On Partition.—X. On Widowhood.—XI. On the Testamentary Power. And, XII. On Contracts.

If others have had to vindicate themselves from the presumption of attempting tasks, in which they have been ably preceded, the present is an instance, where

one of considerable difficulty and nicety, as well as of importance, has been ventured upon without a guide. No work of the kind existing in the English language, of the utility of such a one, according to the merit of its execution, little doubt can be entertained; adverting especially to the more modern materials, upon which it is in part founded.(1) For the undertaking, the author is not without a becoming consciousness, how greatly it will stand in need of apology; and this not the less, if he have been so ill advised, as to have been throwing away his labour on an unworthy subject. Howsoever it may have been disesteemed by some, it is sufficient surely to entitle it to attention, that it regards the law, by which are to be regulated the civil interests of the Hindu population of so extensive a portion of the empire, as India embraces. In preserving it, so far as Britain has done, to the millions who claim the benefit of it as their inheritance, she has conformed to the wisdom of experience, and the dictates of humanity; considerations, (it is not irrelevant to remark,) that appear to have had their influence with this very people themselves, as referable to others, from the earliest period of their legislation. Speaking of the king having effected a recent conquest, "*Let him* (says Menu) *establish the laws of the con-*

(1) See Preface, p. xix.

quered nation, as declared in their books."(1) And, while such shall continue to be our policy,(2) it must follow, that every attempt to facilitate a knowledge of them, among those by whose instrumentality they are to be administered, must be in itself laudable. It is the duty, as well as interest of Britain, to foster those, whom it has become the unworthy fashion to abuse, and undervalue. It were at least a more magnanimous course, *parcere subjectis*. Nor can it be a commendable one, in any point of view, to irritate, by insulting them. It is true, that works calculated to produce this effect, are not very likely to find their way to Hindu understandings. Yet they influence but too often the creed of those, by whom Hindoos are to be governed; and our tenure of India will be but little strengthened, by the conqueror, in the persons of the Company's writers and cadets, being taught to contemplate the conquered with horror, or to look down upon them with contempt. Reflections such as these, sufficiently warranted by the subjoined references,(3) must carry with them increased force, should it become our policy, (than which nothing is more to be depre-

(1) Menu, ch. VII. v. 203.

(2) "And whereas it is expedient, that the inhabitants should be maintained and protected in the enjoyment of their antient laws, usages, rights, and privileges," &c. 21 Geo. III. c. 70. (1781).

(3) See a paper in the 2d vol. of "Transactions of the Literary Society of Bombay," by Major Vans Kennedy.—Mr. Grant Duff's History of the Mahrattas, vol. i. p. 24. And Sir John Malcolm's Works, *passim*; particularly, his Political History of India, vol. ii. p. 285.

cated), to extend our invasion of the Native, by opening upon him the flood-gates of our population; with a view, under pretence of consulting his good, but in reality for our own benefit, to visit him, in the interior, with an "unrestricted settlement of Englishmen."— Forbid it, humanity!

HINDU LAW.

CHAP. I.

ON PROPERTY.

Every disquisition on the origin of property, among a people with whose early history we are unacquainted, must needs be conjectural; and, as such, misplaced in a work, which, in its nature, excludes fancy. What the state of it was anciently in India, able inquirers have been divided in shewing.(1) Till lately, the prevailing opinion was, that the right to the soil was in the sovereign; a persuasion, that has been elaborately combated, in an incidental chapter of a comparatively recent history, of deserved celebrity.(2) The general idea of property comprehending, as it does, personal, as well as real,—moveables, with that which is immoveable,—in most civilized countries, the land for obvious reasons, takes the lead, in point of importance.(3) It is peculiarly so with the Hindoos, who may be regarded as having been in all time

(1) Grant.—Rouse.—Plans for Government of British India.

(2) "Historical Sketches of the South of India," by Lieut.-Col. Mark Wilks, ch. V. See also Observations on the Mimansa, by Mr. Colebrooke, quoted in Mr. Tucker's Financial Statement, 1824. p. 110. 117. and Pref. to this Work, p. xvii.

(3) Blackstone's Comm. vol. ii. p. 384. 12th edit.

an agricultural, rather than a commercial, or manufacturing people. It is, with them, the fund that is principally looked to for the maintenance of families:(1) and to which, in different provinces, and under successive despotisms, they are recorded to have clung to the last, as long as the exactions of power left to them (whereever they did leave) any thing, that could be called a proprietor's share.

In the Bengal provinces, where the Mahomedans, by the time that the English began to supersede them, had long ruled with unlimited, and unrelenting sway, the right of the Hindoo in land was no longer to be traced; and he had degenerated into a mere cultivator, liable to have his share of the produce continually reduced, and varied. Such as it was, the right of cultivation was descendible; affirming for the government, and denying to the inhabitants, every thing like property in the soil. Nor was there wanting (as it would seem) authority in the Shasters, for a condition of things so abhorrent from natural right.(2) In a part of the Digest, purporting to be a disquisition on property in the soil, and founded on an ancient text, it is, in effect, all vested in the sovereign; leaving to the people only an annual, defeasible interest,(3) subject to constant diminution, at the will of the ruling power. So convenient a doctrine, uniformly maintained by the preceding (the Mahomedan) government, was, upon our acquisition of territory in

(1) Bhowannycharn Bunhoojea *v.* The heirs of Ramkaunt Bunhoojea; Beng. Rep. 1816, p. 565, et seq.

(2) 1 Blackst. Comm. p. 138.—Id. vol. ii. p. 2. edit. 12.

(3) 1 Dig. 460.

India, long acted upon by ours, following implicitly what appeared to be the law of the country; till, impressed with its perniciousness, as tending, by the disallowance of property, to discourage improvement, the Bengal government, under the administration of Lord Cornwallis, so far restored the subject's right, as to fix, professedly for ever, payable in money, the proportion to which the state should be entitled; leaving to the possessor of the land, after this deduction, the benefit of progressive improvement, with an unrestrained power of alienation, to be regulated only by the native law.(1)

In the provinces to the South, the Mahomedan invasion had been comparatively recent, and partial; and, in proportion as it had been so, private property in land was found to be there not only more perfect, but more prevalent. That it existed by the Hindu law, as once in force, is now (it is believed) no longer doubted.(2) Among the various speculations as to its commencement, none can be more rational than the position laid down by Menu, that "cultivated land is the property of him "who cut away the wood, or who cleared and tilled it;" (3)—of the produce of which the ordinary proportion accruing to the sovereign was a sixth; and, in times of urgent distress, a fourth.(4) Beside this, unless where

(1) Post, p. 236.

(2) Menu, ch. IX. 52, 53.—Id. VIII. 239. 243.
1 Dig, 471. 473.
Dee on d. Mootoopermall and others v. Tondaven and others.
Notes of Cases at Madras, vol. i. p. 260. Ed. 1827.
See also references (2) Ante, p. 13.

(3) Menu, ch. IX. 44.—Memoir on Central India, by Sir John Malcolm, vol. ii. p. 1.

(4) Menu, ch. VII. 131, 132.
Id. VIII. 304. 308.—Id. X. 118.
2 Dig. 168.

land was allotted to them from the corporate stock, parts of the produce of each proprietor was, and continues to this day, to be distributable, to the officers and artisans,—to the twelve *Ayangadees*, (as they are called,) administering the justice, preserving the peace, managing the concerns, and supplying the wants, or contributing to the convenience of every town or village; of the aggregate of which, (well described, as it has been, as a mass of little republics,) India is constituted.

Another distinction that runs through many of their provisions as to property, is, into *ancestral*, and *self-acquired;* with regard to which, if any, lost in the time of the ancestor, be recovered by the heir, it is no longer considered as ancestral, but classes as self-acquired; while, what has been acquired, through the use of the patrimony, is deemed ancestral.(1) And here it may be observed, that the people being divided into castes, appropriate modes of acquiring property are assigned to each; but they are little regarded in practice, not being liable to be enforced by law.(2) As with us also, property is further distinguishable into *real* and *personal*, *moveable* and *immoveable;* real, or immoveable property, among the Hindoos, including, beside land and houses, *slaves* attached to the land,( ) and annuities secured upon it, (4) the latter bearing a close resemblance to that species of incoporeal hereditament, which we call *corodies*.(5) But, between the Hindu law,

(1) Post, p. 217.
(2) Post, p. 302.
(3) 2 Dig. 114. 141.
(4) Jim. Vah. ch. II. 9. 13, 14. 25.
(5) Post, Append. to ch. IX. p. 363.

and ours, there is, in respect to property, this material difference; that, whereas, while, by ours, land descends to the heir at law, the personal goods of a deceased vest in executors or administrators, distributable among the next of kin; by the Hindu law, real and personal are alike descendible, to the same persons, and subject to the same incumbrances; as will be more particularly shewn, in the chapters on inheritance, and the charges to which it is liable.

These general distinctions having been thus briefly noticed, it will be convenient to pursue the subject, by investigating it, with reference to ownership, in the different relations, of, 1. *Family* property; 2. *Private,* or separate property; 3. *Stridhana,* or as it is called emphatically, *woman's* property; 4. The property of *religious* institutions; and, 5. Property partaking of the nature of *jura regalia.*

And, first, with regard to *family* property. So interwoven is the idea of family, wherever, with the Hindoo, property is concerned, that their law scarcely ever contemplates any one with reference to it, but as the head of one; and, as such, a trustee, more or less, for numerous interests, which the Shaster has shewn great anxiety to protect. This appears more especially in the case of *land;* in which, in particular, according to the doctrine of the *Mitacshara,* as prevalent in the Peninsula, and north of India, the sons of a man are considered as having with their father, by birth, so far a co-ordinate concern in that part of it which is ancestral, that, if he thinks proper to come to a partition of it in his lifetime,

(a disposition of property, the particulars of which will be seen in a subsequent chapter,) (1) he must divide, as directed by law: i. e. give them and himself equal shares; nor is it in his power to aliene any considerable portion of it, without their concurrence. It is, according to this school, like dignities with us, inherent in the blood; and therefore, so far as regards the interest of parceners, unalienable. The Bengal School follows the same rule with respect to partition; admitting to the father otherwise an unreserved power of alienation over all that he possesses;—however, in particular instances, its exercise may be liable to censure.

That the power of alienation is so restrained, may be deduced from the form prescribed for a Hindu *grant;* as, in Westminster Hall, the law, in any particular, is inferred from the forms of *pleading;*—a Hindu grant of land purporting, as it does, to reserve what may be necessary for the subsistence of the grantor's family; to which Catyayana adds, beside, his dwelling-house.(2) The restriction, as it respects the maintenance of a man's family, is against the alienation of the *whole* of his estate,(3) (meaning *land,*) not of a small part, no way affecting its support;(4)

(1) Post, ch. IX. p. 176.

(2) 2 Dig. 133. Yajnyawalcya, 3 Id. 5.

(3) Jim. Vah. ch. II. 23.
Nareda, 2 Dig. 97. 113. 141.
Vrihaspati, Id. 98.
Catyayana, Id. 105. 133.
Dacsha, Id. 110.
Misra, Id. 111.
Beng. Rep. 1816. p. 566,
Post, Append. to ch. I. p. 5.—C.

(4) Jim. Vah. ch. II. 24.

and, if there be no land, nor property of that description, the reason applying, it extends to jewels, or similar valuables.(1) It may be remarked here, that the attempt is treated as a symptom of insanity, and void upon that ground ;(2) which was precisely the insinuation of the Roman law, in the case of an inofficious testament. To this principle, of protection against the act of the father and husband, is perhaps to be ascribed the circumstance, that in the case of land, the Hindu law contemplates *gifts* only: as if there never could be danger of a man's *giving*, to an extent to leave his family destitute; insomuch that, whatever be the nature of the conveyance intended, the form should be properly that of a gift, with the ceremonies of donation ;(3) authenticated with the greatest publicity, for the sake of certainty as to boundary, and as a security against future disputes ; the law requiring the writing for the purpose (though a deed is not indispensable) to be attested by witnesses, in the presence of neighbours and kindred, *with the assent of parties interested*, and under the sanction of a public officer.(4) Not that property in land cannot be legally divested and transferred by *sale*, as well as by *gift;* the former (says Jagannatha) occurring constantly in practice.(5) The concurrence of sons in the alienation by the

(1) Sricrishna, note to Jim. Vah. ch. II. 26.
(2) 2 Dig. 118.
(3) 3 Dig. 432. and note.
Note to Jim. Vah. ch. I. 22.
Post, Append. to ch. I. p. 7.—C.
Sham. Sing *v.* M. Umraotee; Beng. Rep. 1813. p. 395.
(4) 2 Dig. 161.
(5) 3 Dig. 432.

father, of land, however derived, as required by the Mitacshara, is dispensed with, where they happen to be all minors at the time, and the transaction has reference to some distress, under which the family labours, or some pious work to be accomplished, which the other members of it, equally with the father, are concerned should not be delayed. Such are the consecration of sacrificial fires, funeral repasts, rites on the birth of children, and other prescribed ceremonies; not to be performed without an expense, in which the Hindoos are but too apt to indulge, on such occasions, to excess.(1) Urged by any such consideration, and the sons at the time incompetent to judge, their concurrence may be assumed; and the father will be justified in acting without it, to the extent that the case may require.(2) And, even of *moveables*, if *descended*, such as precious stones, pearls, clothes, ornaments, or other like effects, any alienation, to the prejudice of heirs, should be, if not for their immediate benefit, at least of a consistent nature. They are allowed to belong to the father, but it is under the special provisions of the law. They are his; and he has independent power over them, if such it can be called, seeing that he can dispose of them only for imperious acts of duty, and purposes warranted by texts of law;(3) while the disposal of the *land*, whencesoever derived, must be in general subject to their control; thus, in effect, leaving him un-

(1) Mit. on Inh. ch. I. sect. i. 29.
2 Dig. 118.

(2) Mit. on Inh. ch. I. sect. i. 28, 29.

(3) Mit. on Inh. ch. I. sect. i. 27.

qualified dominion only over *personalty acquired.*([1]) Whereas, in the Bengal provinces, following the tenets of a different school, the power of the father over his pro perty is less restrained, requiring for its alienation the concurrence of his sons, only in the instance of *land inherited.*([2]) And, even with regard to this, though a father in Bengal should aliene the whole of his property without it, the act is in law valid, under a distinction peculiar to it in that part of India, maintaining the legal validity of acts, however militating with the intention and policy of the law.([3]) Whatever may be thought of these clogs on alienation, in a country highly commercial like our own,—founded, as they are, upon the benevolent principle of providing for those, in whose favour every man contracts a debt, upon becoming the head of a family,—in this view, they are not unfit to be enforced; and, though experience in England may have led there to the gradual removal of all restrictions of the kind, let it not be forgotten by the readers of the "Commentaries," that, by its ancient law, not only could the feud "not be transferred from one feudatory to another, without the consent of the lord," but that even, with it, it could not be aliened, "unless the owner had "also obtained the consent of his own next apparent, or

(1) Post, Append. to ch. I. p. 8. 12. 17.—C. and S.
Note to Jim. Vah. ch. II. 31.—Yajnyawalcya, 2 Dig. 113.
Jagannatha, Id.
Post, Append. to ch. I. p. 6 to 14.
and to ch. XI. p. 442.

(2) Jim. Vab. ch. II. 27, et seq.
Prannath Das v. Callishunder; Beng. Rep. ante 1805. p. 51.
Qu. tamen, and see case of Bhowannychurn Bunhoojea v. The heirs of Ramkaunt Bunhoojea, Beng. Rep. 1816. p. 564.
Post, Append. to ch. I. p. 6. C.—16. S.

"presumptive heir;" insomuch, (adds their learned author,) that "it was usual, in ancient feoffments, to express that the alienation was made by consent of the "heirs of the feoffor, or sometimes for the heir apparent "himself to join with the feoffor in the grant;"(8)—precisely as has been seen to be the course by the Hindu law. Nor does the analogy of these prohibitions stop here, as we learn from their relaxation in our own country; by which a man was, in progress of time, allowed to sell and dispose of lands that had been *purchased* by him; over which "he was thought to have a more extensive power, than over what had been *transmitted* in a "course of descent from his ancestors;" but the law still did not authorize him "to sell the *whole*, even of his own "*acquirements*, so as totally to disinherit his children," any more than it permitted him, of his own mere will and power, to aliene his *paternal* estate at all.(1) Nor perhaps, for the sake of illustration, will it be digressing too much, to advert here to the correspondent doctrine of the *civil* law; in the eye of which (it may be remembered) the father and son, (and, failing him, the grandson by representation,) were so far looked upon as one person, that the son was scarcely regarded as succeeding to the inheritance on the death of the father, being, by a fiction of law, rather considered to have been in possession before;—distinctions, and fictions, that might almost be thought to have been derived originally from the Hindu law; such a resemblance is there between it,

(1) 2 Blackst. Comm. p. 287. 12th edit. 8vo.

(2) 2 Blackst. Comm. p. 288.

and these European codes, ancient and modern, in these particulars. There is an equally strong one between it and them, in the incapacity of aliening, arising from personal causes, whether physical or moral; the Hindu law providing that, to be capable, a person must be not only *sui juris*, with reference to idiotcy, lunacy, infancy, or minority, imbecility resulting from age or disease, and duress, with the state of slavery and degradation, (the latter answering, in some sort, to attainder with us,)—but he must have, at the time, a clear conception of what he is about; the law under consideration manifesting, indeed, in this respect, a care beyond other codes, by extending it to cases where the party undertaking to dispose of his interests happens at the time to be intoxicated, or to be acting under the influence of some over-ruling passion, as well as to the ordinary ones of mistake, or imposition.(1) Hence the distinction that has been alluded to, as prevalent in the Bengal school, between the act of a person under any of the enumerated disabilities, which is void, and that of one of sound mind, not impelled by passion; which latter, however censurable it may be, as being prohibited, will be nevertheless valid,(2) upon the principle of *factum est, quod fieri non debuit;* or, as this class of lawyers themselves express it, that "a fact cannot

(1) Menu, ch. VIII. 163.
Nareda, 2 Dig. 181. 187. 193.—Yajnyawalcya, Id. 193.
Catyayana and Vrihaspati, Id. 197.
Bhowannychurn Bunhoojea *v.* The heirs of Ramkaunt Bunhoojea; Beng. Rep. 1816. p. 564.
Post, Append. to ch. I. p. 15.—C.

(2) Jim. Vah. ch. II. 28, 29.
2 Dig. 105. 113. 117. 159. 201.
3 Dig. 37, et seq.

"be altered by a hundred texts;"(1)—a doctrine, of which no trace is to be found in the Benares school, in the *Mitacshara*, the *Smriti Chandrica*, or the *Mádhavya*,—all in full force in the Peninsula;—the author of the *Smriti Chandrica*, on the contrary, maintaining, that what has been unduly given must be considered as not given, and that the restoration of property, held under a prohibited gift, should be enforced by the ruling power.(2) And, even in Bengal, (as already intimated), inconsistent as it may seem, if a Hindu father propose to make a *partition* of *heritage* in his lifetime, he can, by this means, divide his property only among his sons, and according to certain prescribed rules,(3) said not to have been hitherto weakened by any express decision;(4) such being the effect of the acknowledged interest that sons have in the possessions of their parent, which it never was the intention of the law should be wantonly, or arbitrarily violated. Whereas, if he think proper to proceed by way of *gift*, embracing, as this does, distinct from partition, every species of conveyance and charge, under the construction put upon it, that it is valid, however improper; and that, though the giver may be culpable, the title of the receiver is good, whoever he may be, and under what-

(1) Jim. Vah. ch. II. 30. and note to § 31.

(2) Mohun Lal Khan *v.* Rance Siroumunnee; Beng. Rep. 1812, p. 352.
Letter from Mr. Colebrooke, dated Dec. 13, 1812.
Post, Append. to chap. XI. p. 440.

(3) Jim. Vah. ch. II. 50. 74. 76. 83.
Ante, p. 18.—Post, p. 194.—3 Dig. 4.

(4) Letter from Mr. Colebrooke, dated July 22, 1812.
Post, Append. to ch. XI. p. 437.
Vid. tam. his "Remark" on the case of Eschanchund Rai *v.* Eschorchund Rai, (the Nuddea case:)
Beng. Rep. ante 1805, p. 3.

ever circumstances it may have been created, it being always understood that the giver was the owner of the property, under no personal disqualification or disability, —such being the reasoning, the father of a family there is thus at liberty to disappoint every expectation, however reasonably entertained, by either alienating his property from it altogether, or by substituting among its members, by this mode, a distribution wholly different from the one prescribed by the law; so as to have led to the observation, that "the Hindu legislators might have saved themselves the trouble of providing rules to regulate a father's distribution, if the whole may be evaded by the very easy expedient of calling it a *gift*, instead of a *partition*."(1)

2. As to *private*, or separate property. To one, not the head of a family, restrictions upon alienation do not, in general, apply. Property *acquired* by a single man, not shared by a coparcener, may be enjoyed and disposed of by him, as he pleases; remoter heirs not being, with regard to it, objects of legal care. His entire alienation of it, without consulting any one, being "the "act of a person who is his own master, is valid."(2) Only, even with reference to one thus isolated, what he does not dispose of in his lifetime, must be left to descend in a course of inheritance; the right of aliening, with very little exception, being confined to acts to take effect

(1) Post, Append. to ch. XI. p. 437.—C.
Eschanchund Rai *v.* Eschorchund R. Bengal Rep. ante 1805, p. 2.
Ramcoombar *v.* Kisherkunder, Id. 1812. p. 359.
But see since Bhowannychurn Bunhoojea *v.* Ramkaunt Bunhoojea, Id. 1816, p. 546. 564.; as referable to land *inherited*.

(2) 2 Dig. 156.—Post, Append. to ch. I. p. 5. and to ch. X I. p. 432. and 435.—C.

in the life of the grantor. But, the property being *ancestral*, it makes no difference whether the owner be single or married; since, in neither case, can he dispose of it, without consent of the heir, who, in the case supposed, may be his father, mother, brothers, nephews, or other remote relations.—In support of these positions, but little indeed is to be gleaned from any authority accessible to the English reader; the reason of which may be, that the Hindoos reprobating, as they do, a single state, their law is, in a great measure, silent as to its rights.(1)

3. Property, as hitherto spoken of, is supposed to be the man's. But the Hindu law assigns to the sex also, what is called emphatically *Stridhana*, or "woman's property:" the term being derived from *Sri*, female, and *dhana*, wealth;(2)—not that it means necessarily money; it may consist of any thing else of value, as of land;—or a slave;(3) as it more usually does of jewels, or other ornaments.(4) Though it be the sex's, it is with reference to wives, or widows, that the law concerning it comes most frequently in question; few women among the Hindoos, from the time that they are marriageable, remaining single. To constitute it, it must have been the gift, not of a stranger, but of a husband, or some one or other of the owner's near relatives.(5) If derived from a stranger, or earned by herself, in either of these cases,

(1) Post, Append. to ch. I. p. 13. and ch. XI. p. 435. 439.

(2) Mit. on Inh. ch. II. sect. ii. 3.

(3) Post, Append. to ch. I. p. 20.--C.

(4) Post, Append. to ch. II. p. 54.

(5) Post, Append. to ch. I. p. 19.

according to the most general understanding, not coming within any of the instances hereafter enumerated, it vests in the husband, if she have one, and is without reserve at his disposal.(1) Whereas the *Stridhana* of a married woman is hers; unless, according to the law as prevalent in Bengal, it consist of land, given to her by her husband, of which the dominion remains with him;(2) and, howsoever derived, and of whatever quality, he has universally with her so far a concurrent power over it, that he may use it in any exigency, for which he has not otherwise the means of providing; and this, without being accountable after, for what he may have so applied. The alleged occasions are, the preservation of the family during a famine, which may be construed to mean generally want; any distress, having the effect of preventing the performance of an indispensable, particularly of a religious duty; sickness; imprisonment; and even the distress of a son.(3) It would seem, however, that the right is personal in the husband; since it has been held, in the case of a writ of execution for a debt due by one, that the wife's *Stridhana* could not be seized under it;(4) though, had he been arrested, or

(1) Jim. Vah. ch. IV. sect. i. 20.
Daya Crama Sangraha, ch. II. sect. ii. 25. 28, 29.
Catyayana, 3 Dig. 566.—Post, p. 49.

(2) Jim. Vah. ch. IV. sect. i. 20.
Daya Cr. Sangraha, ch. II. sect. ii. 31.
Nareda, 3 Dig. 575.
Colebrooke (on Obligations), p. 28.
Post, Append. to ch. I. p. 19. C.—21. S.

(3) Jim. Vah. ch. IV. sect. i. 24.
Mit. on Inh. ch. II. sect. xii. 31. et seq.
Daya Cr. Sangraha, ch. II. sect. 33, 34.
Devala and Yajnyawalyca, 3 Dig. 578.
Post, Append. to ch. I. p. 22. Id. to ch. II. p. 59.—C.

(4) Post, Id. Append. to ch. I. p. 23.—C. and E.

taken, he might (*ex concessis*) have applied the ornaments upon her neck to its discharge, having no other means of extricating himself from legal custody. Nor is this all: for though, subject to the occasions that have been specified, the absoluteness of her right in the property in question is generally asserted,(1) it would seem to follow, from the universal condition of Hindu females, uneducated, and thence liable to perversion and influence, that any gross abuse of it by her will be controllable by her father, while single, by her husband during coverture, and by her guardians after his death; such interference being itself subject to revision by the judicial power, since otherwise the idea of *Stridhana* would be but a mockery.(2) Of the property in question, it is most commonly said, with reference to the married, that there are six descriptions; (3) but the authorities do not concur as to the precise number; and a good deal of reasoning has been employed in discussing, without satisfactorily determining, whether this number, most generally adopted, is to be taken restrictively of a larger, or only as exceptive of a less.(4) The following enumeration, extracted prin-

(1) Jim. Vah. ch. IV. sect. i. 21.
Catyayana, 3 Dig. 574. Nareda, Id. 575.
Post, Append. to ch. XI. p. 428.—S.

(2) Nareda, 2 Dig. 384. Catyayana, 3 Id. 576. Id. 626. Referring to what is stated in the text, it may be remarked that, in the Bombay Reports, the instances are numerous, where, the widow being in possession, the Courts, in that part of India, have refused to enact security from her against misapplication; or to restrict her, in the enjoyment or disposal of what she has.
Post, p. 57. 246.

(3) Menu, ch. IX. 194.
Jim. Vah. ch. IV. sect. i.
Mit. on Inh. ch. II. sect. xi.
3 Dig. 557.

(4) Jim. Vah. ch. IV. 1. 18. 3 Dig. 568.

cipally from the *Smriti Chandrica*, comprehends nearly all that occur elsewhere, and more than are universally admitted, as will be noticed in specifying them; the specification being accompanied with such remarks, as the subject may seem to require, or may naturally suggest. I. What is given to a young woman, or to her husband in trust for her, at the time of her marriage, that is, during the space from the beginning to the close of the nuptial ceremony, commencing with the oblation for increase of prosperity, and ending with a return of the salutation; but not to be confined rigorously to the day, if given on account of the marriage.(1) II. Her *fee;* or what is given to her in the bridal procession, upon the final ceremony, when the marriage, already contracted and solemnized, is about to be consummated, the bride having hitherto remained with her mother; as will appear in the next chapter.(2) And the misery of Hindu marriages, at (on the part of the female) an immature, and often an inordinately disproportioned age, is sensibly shewn, by the present in question being said to be intended as a *bribe*, to induce her to repair the more cheerfully to the mansion of her lord. (3) It may be here remarked of this *domi-ductio*, this bringing of the bride home, which, with the Hindoos, is a consequence only of the antecedent contract,(4) that, among the Romans, it was an ingredient

(1) 3 Dig. 610.—2 Id. 154.
Prankishen Sing *v.* Mt. Bagwhutee, Bengal Rep. ante 1805, p. 3.
Post, p. 38. and Append. to ch. III. p. 29.

(2) Post, p. 37.

(3) Jim. Vah. ch. IV. sect. i. v.—Id. sect. iii. 21.
Mit. on Inh. ch. II. sect. xi. 5.
Daya Cr. Sangraha, ch. II. sect. ii. 8.
Vyasa, 3 Dig. 370.

(4) Post, Append. to ch. II. p. 32. 34.

wanting to its completion; till when, the bride was "*sponsa*" only; becoming "*uxor*, statim atque *ducta* est, "quamvis nondum in cubiculum mariti venerit." The *fee* of a Hindu wife has moreover this anomaly attending it, that, upon her death, it descends in a course of inheritance peculiar to itself.(1) III. What is given to her on her arrival at her husband's house, when she makes prostration to her parents. IV. Gifts subsequent, by her parents, or brothers. V. Upon her husband proposing to take another wife, the gratuity given by him to reconcile the first to the *supersession*, the measure of which seems not to be settled; (2) as will also be more particularly seen in the following chapter.(3) VI. What a woman receives from the bridegroom, on the marriage of her daughter. VII. What she owes at any time to the good graces of her husband; as, for instance, a reward for performing well the business of the house in her department, called her *perquisite*.(4) VIII. Any thing given her at any time by any of her relations, being specially given; —a description, sufficiently general to comprehend gifts so made to her before marriage, while yet an unbetrothed member of her own family; which are expressly included by various authorities.(5) IX. The earnings of her industry, as by sewing, spinning, painting, and the like.(6) Such

(1) Post, p. 51, and 250.

(2) Mit. on Inh. ch. II. sect. xi. 30.
Daya Cr. Sangraha, ch. II. sect. ii. 15.

(3) Post, p. 52.

(4) Catyayana, 3 Dig. 563. 569.

(5) Jim. Vah. ch. IV. sect. i. 21.—
Id. sect. iii. 11, 12. 15.—Mit. on Inh. ch. II. sect. xi. 5.

(6) Post, p. 50

are the instances of *Stridhana*, specified in the *Smriti Chandrica:* upon the last of which it must be remarked, that it does not occur in the enumeration given in the *Mitacshara*, (1) any more than in Menu ;(2) while Jimuta Vahana, with others, exclude it, observing that, though the proceeds be hers, they do not constitute "woman's property," and that her husband has a right to them, independent of distress. (3) Yet, it seems admitted, that her heirs, and not his, succeed to them after her death, she having survived him ; (4) the reason for the doubt as to their constituting *Stridhana* being, that it is payment by strangers, not a gift from her husband, or any of her relations,—a circumstance belonging to the description of the property in question. (5) The same objection applies to, x. What is given to a wife for sending, or to induce her to send her husband to perform particular work; which by some is included, (6) by others denied. (7) xi. Property, which a woman may have acquired by inheritance, purchase, or finding ;—what has been inherited by her being so classed by Vijnyaneswara, whose authority prevails in the Peninsula ; while it is otherwise considered by the writers of the Eastern school. (8) Lastly, xii.

(1) Mit. on Inh. ch. II. sect. xi.

(2) Menu, ch. IX. 194.

(3) Menu, ch. VIII. 416.—Jim. Vah. ch. IV. sect. i. 20. Catyayana, 3 Dig. 566.—Nareda, 2 Dig. 249. Post, p. 50.

(4) 3 Dig. 472. 495, et seq.—3 Id. 628.

(5) Post, Append. to ch. I. p. 21.

(6) Jim. Vah. ch. IV. sect. iii. 19, 20.

(7) 3 Dig. 568.

(8) Mit. on Inh. note to ch. II. sect. xi. 2.—3 Dig. 568. 627.

The savings of her maintenance. (1)—Dying, without leaving issue, the *Stridhana* of a married woman vests by descent in her husband, he surviving her. (2) The succession to her, she surviving him, will be found detailed in a subsequent chapter, on widowhood. (3)

4. and 5.—Of the property of *religious Institutions*, and of that partaking of *jura regalia*, something will be incidentally said in parts of this work, in which a reference to them connects with other subjects of discussion ;(4) materials, concerning them, that are accessible, being too scanty to admit of any extended investigation.

It remains to speak of *title*, which is not valid, unless there have been possession under it ; for which purpose possession of a part is possession of the whole. (5) Nor can the want of it be accounted for on the ground of opposition by an adverse party, (6) the rule requiring, that there should be *juris et seisinæ conjunctio*, to make a completely legal one ; it being laid down, that occupancy alone is not sufficient to constitute a right, without a title, and that the production of a title will not suffice, unsupported by occupancy ; a right resulting only from the union of both.(7) But though simple occupancy, without a title, will not constitute a right, a title may be *inferred* from *possession ;* which (to use the language of our own

(1) Jim. Vah. ch. IV. sect. i. 15, and note.— 3 Dig. 567.
(2) Post, ch. II. p. 51.
(3) Post, ch. X. p. 246.
(4) Post, p. 151. 198. 208. 210.
(5) Yajnyawalcya, Beng. Rep. 1816, p. 554
(6) Id. p. 552.
(7) Beng. Rep. 1816, p. 553.
Post. Append. to ch. XI. p. 4[illegible] —C.

law, the doctrine of it and of the Hindu being in this respect substantially the same) "may, by length of time, and "negligence of him who has the right, ripen by degrees "into a perfect and indefeasible title." (1)—But, to be attended with this effect, the possession must have been that of a stranger, not that of one standing in certain degrees of relationship (*Sapinda*,(2) or *Saculya*)(3) to the rightful owner. (4) Nor even, in the case of a stranger, will it avail him, unless it have been maintained in the sight of the adverse party, without let or molestation on his part, he not having been under any disability to prevent his interference, and thereby obviate the conclusion of his having acquiesced; since, where neglect is not imputable, the title of a rightful owner retains its validity.(5) Possession, under the circumstances that have been stated, for ten years, if the property be of a personal nature, or for twenty, if it be real, extinguishes the right of the original owner; he having been, during the time, in a condition to vindicate it, though it is said to be otherwise, in the Southern part of India.(6) Generally speaking, in case of dispute, a title must be proved by the original holder; but, if there have been a descent, the presumption of right is in favour of the heir, so as to cast upon the adverse party the burthen of disproving

(1) Blackst. Comm. vol. ii. p. 196. 12th edit.

(2) *Sapinda*, near kindred, offering the funeral cake to the same ancestor.

(3) *Saculya*, remote kindred.

(4) Vrihaspati, Beng. Rep. 1816, p. 557.

(5) Vyavahara Matrica; Beng. Rep. 1816, p. 557.
Vrihaspati. Id.

(6) Post, p. 308. Append to ch. I. p. 26.—2 Bombay Rep. p. 222.

it; in which case also there is some analogy between the Hindu law, and our own; and, if the possession have continued for three generations, it cannot be disturbed.(1)

Of the three universally recognised natural rights, viz. the right of *personal security*, (referable as well to the unmolested enjoyment, as to the preservation of life,) the right of *personal liberty*, and the right of *private property*, it having been the policy of the British legislature, with regard to the two former, to leave the native at our Presidencies to the protection of the English law, to be modified, in its application, by the discretion and wisdom of those intrusted to administer it, its benevolence has confirmed to him, with respect to the latter, the benefit of his own code and customs; by directing that his *inheritance and succession* to lands, rents, and goods, with all matters of *contract* between party and party, shall be determined by such laws and usages, as the same would have been determined by, had the suit been commenced in a Native Court. (2) Of these two great titles, property, that has been discussed, pervades both, with reference either to transmission, or exchange. And, as inheritance pre-supposes marriage, this, with some subordinate titles, springing out of it, will form the matter of the next, and some subsequent chapters. And, first, of marriage.

(1) Vyavahara Matrica; Beng. Rep. 1816. p. 553. 557. Vid. tam. Post, Append. to ch. I. p. 26.

(2) See the Royal Charters.

CHAP II.

ON MARRIAGE.

By no people is greater importance attached to marriage, than by the Hindoos. It is, among them, with one sex, (the female,) indispensable. With the other, it constitutes the order of *Housekeeper*, (*Grihasta;*) the second, and most respectable of the four, by which, with them, the different periods of human life are distinguished.(1) It completes for the man the regenerating ceremonies, expiatory, as is believed, of the sinful taint that every child is supposed to contract in the parent's womb;(2) and being, for the Sudra, and for women, the only one that is allowed, (3) its obligatoriness is, as to the latter, among the ordinances of the Veda.(4)—Thus religion and law co-operate with the climate in its favour.

(1) Menu, ch. IV. 1. VI. 89, 90. They are thus enumerated, 1. The religious student, (*Brahmachari,*) who has received investiture, and is in a course of pupillage. 2. The householder, (*Grihi,*) or married man. 3. The hermit, (*Vanaprasta.*) 4. The mendicant, ascetic, or anchoret, (*Bhikshu*, *Sanyasi*, or *Yati.*) Datt. Mim. p. 62, note 60. Menu, ch. VI. 1. 38, 39. 87. Dubois, on the people of India, part ii. ch. I. p. 91. 4to edit. The first stage may be prolonged through life, without passing into the order of housekeeper; whence there are three religious orders: the perpetual student, the hermit, and the anchoret.—C.

(2) These will be found enumerated under the following references, viz. Note to Mit. on Inh. ch. I. sect. vii. 3.—Note to Dat. Mim. sect. iv. 23.—Note to 3 Dig. 104. See also Id. p. 606.—Menu, ch. VI. 91.—Asiat. Res. vol. vii. p. 310.

(3) 3 Dig. 94. 2 Id. 391.
Note to Mit. on Inh. ch. I. sect. vii. 9.

(4) Menu, ch. II. 67.

The consideration of it, regarded as the foundation of a family, of which the husband is the head, involves, not only the reciprocal rights and duties of man and wife, but the derivative ones also of parent and child, guardian and ward. To select a suitable husband for his daughter, at an age when she can have but very imperfect ideas of the object, every Hindu father is expressly bound; failing whom, the duty is incumbent on a succession of paternal relations, and finally on the mother;(1) which having been neglected, to the prejudice of the girl, for three years from the time that she becomes marriageable, she is at liberty to choose for herself.(2) Though the law be so, it may be a question, whether, according to modern practice, the right do not in this case continue to attach to the substitutes for the father, instead of vesting in the girl.—And, as to the proper time, according to Culluca Bhatta, the distinguished expositor of Menu,(3) it precedes puberty,(4) Menu having enjoined every man to give his daughter in marriage, though she have not attained the age of eight.(5) This is to be understood, however, of what is called the *betrothment*,(6)

(1) Yajnyawalcya, 3 Dig. 106.—1 Bombay R. p. 14.
Post, Append. to ch. II. p. 28. 30.—C.

(2) Menu, ch. IX. 4. 89, 90.—Vribasp. 2 Dig. 386. 491.
Jim. Vah. ch. XI. 11. 6.
The King *v.* Kistnama N.; Notes of Cases at Madras, vol. ii. p.

(3) Yajnyawacyla, 3 Dig. 106.
Post, Append. to ch. II. p. 24, 25.—C.
Preface to translation of Menu, p. xiv.

(4) 2 Dig. 386, 387.—3 Id. 328.

(5) Menu, ch. IX. 88. 94.
Jim. Vah. ch. I. 39.
1 Bombay Rep. p. 360, Note.

(6) Post, Append. to ch. II. p. 32. 34, 35.

leaving the girl under the care of her family, till her maturity admits of her husband claiming her; of which it is the province of the mother to give notice. It was the same among the Jews.(1) Revolting as is the idea of an engagement of this nature being finally contracted thus early, it is not a little aggravated by the restriction imposed on virgin widows, not to marry again;(2) and which is never violated, without a loss of character. The betrothment, once effected, by the bride and bridegroom walking seven steps hand in hand, during a particular recital, the contract is perfected upon their arriving at the seventh step;(3) and may be enforced by the husband, on completion of the time.(4) As between Parsees, it is held indissoluble.(5) Previous, and up to betrothment, the affair rests legally in promise; which may be broken, subject to consequences, as the breach can, or cannot be justified. According to Hindu superstition, an agreement for the purpose would be lawfully determined, on the part of the man, by the occurrence of unfavourable auspices; such as a flight of birds, or the chirping of a lizard, in the one or the other direction, when

(1) Selden's Ux. Hebr. L. 31. ch. III.

(2) Menu, general note, p. 364. v. 3.
Asiat. Res. vol. vii. p. 310.
Post, p. 241. and Append. to ch. X. p. 400.

(3) Menu, ch. III. 43. ch. VIII. 217.
2 Dig. 484, note.
Culluca Bhatta, Id. 455.—Yâma. Id. 488.

(4) Menu, ch. IX. 47.
Post, Append. to ch. II. p. 27 to 31.
1 Bombay Rep. p. 138.—2 Id. 245.

(5) 1 Bombay Rep. p. 59. 382. 392.
2 Id. 528.
Aliter, on ground of custom, 1 Id. p. 410.

seeking a prosperous hour for the wedding;(1) and a variety of causes are enumerated, warranting, as they respectively apply, retraction on either side:(2) but, where the attempt to withdraw is without excuse, performance of the engagement may be exacted, as it might have been with us, previous to our marriage act.(3) Wherever, from the existence of a legal impediment, or the death of the young woman, the ultimate ceremony has been prevented from taking effect, the bridal presents are returnable, the bridegroom, in the latter case, paying the expenses incurred on both sides.(4) These presents, where the marriage has been completed, constitute part of the woman's *Stridhana*, as explained in the preceding chapter.(5) They must be *bonâ fide*, however; that is, tokens of courtesy, and the fruit of affection toward the girl, not received by her kinsmen for their own use, amounting to a sale of her, which is forbidden.(6) Where such a gratuity had been given, and the man died before consummation, the widow was anciently marriageable to his brother, he and she both

(1) Post, Append. to ch. II. p. 37.—C.
Introiit in ædes ater alienus canis;
Anguis per impluvium decidit de tegulis;
Gallina cecinit;—interdixit hariolus;
Haruspex vetuit ante brumam aliquid novi
Negoti incipere, &c.——Ter. Phormio, Act IV. Sc. iv.

(2) Menu, ch. IX. 72.—Culluca Bhatta, 2 Dig. 493.
Vasishta, Id. 490.—Yajnyawalcya, Id. 492.
Post, Append. to ch. II. p. 38.

(3) Nareda, 2 Dig. 492.—Post, Append. to ch. II. p. 34. 36.

(4) Mit. on Inh. ch. II. sect. xi. 29, 30.
Sancha, 3 Dig. 614.—Post, Append. to ch. II. p. 36, 37.

(5) Ante, p. 29.—1 Bombay R. p. 64.

(6) Menu, ch. III. 51. 54. Ch. IX. 98. 100. Post, p. 42.

consenting; his consent being specially requisite, she being considered as blemished, by having been previously affianced to another.(1) Such a union is not to be confounded with a practice of appointing a brother (or other near kinsman) to raise up issue (*Chsetraya*) to a childless husband; which, having existed among the Patriarchs, received from Moses the sanction of law; but which, reprobated from the beginning by the higher classes of the Hindoos, appears never to have prevailed but among Sudras.(2) As was the case with the Hebrews in respect of tribe,(3) so with the Hindoos, the contracting parties must be of the same *class*.(4) Without identity of class between the married parties, the issue, according to some authorities, was not esteemed legitimate; while, according to others, the stipulated equality was so construed, as to admit, within that description, the offspring of lawful espousals, between a man of a superior, and a woman of an inferior, provided she were of a *regenerate* tribe; by regenerate, being intended, any other than that of the Sudra; that is, any of the three superior ones;(5) the old law permitting men of higher tribes to marry in tribes so far below them; and allotting, to the issue

(1) Menu, ch. IX. 69. 97.—2 Dig. 466.

(2) Menu, ch. IX. 59. 64. 66.—2 Dig. 466.
Post, Append. to ch. IV. p. 164. 201.

(3) Numbers, ch. XXXVI. v. 6.

(4) Menu, ch. III. 4.—Apastamba, 3 Dig. 159.—Id. 116.

(5) *Regenerate*, has reference to the three classes of Brahmin, Cshatrya, and Vaisya, meaning, born a second time, through the ceremony of *Upanayana*, when these higher classes were invested with the distinguishing thread; the Brahmin before the age of nine, and the other two classes at any time previous to the nuptial ceremony. On it depends also the commencement of the connexion between the pupil and his spiritual teacher, for the purpose of instruction in the Vedas.

of such marriages, shares of the heritage, in certain decreasing proportions. Such was the doctrine of the Eastern school, in which equality of class was, with reference to the wife, understood as excluding, for a man of any of the three superior ones, a Sudra woman only. And, though the writers of the Western school extended the license without reserve, there is said, while it prevailed, to be no mention, even in the recital of any ancient story, of a woman of the servile class becoming the first wife of either a Brahmin, or a Cshatrya, though ever so much at a loss for a suitable match—in such low estimation was the Sudra held by the other classes.(1) But it is unnecessary to dwell upon these distinctions, the practice of such intermarriages being considered to have been prohibited from the commencement of the present (the *Cali*) age;(2) since when, equality of tribe has been ever, as it continues to be, in the strictest sense, essential to a legal marriage, though not to the legitimacy of the issue: inasmuch as, should one so prohibited take place, the issue would notwithstanding be legitimate. But the converse does not hold: the offspring of a woman of a superior tribe, by a man of an inferior one, being excluded from the definition of legitimacy, and consequently debarred from inheriting.(3) But, though the *class* must be the same, the parties must be of distinct, and unconnected *families*, as by the Jewish, and other codes; a condition, carried, by the Hindu law, farther than it was in the Levitical,

(1) Menu, ch. III. 14. Id. ch. IX. 178.

(2) Jim. Vah. ch. XI. sect. i. 47.
Mit. on Inh. ch. I. sect. viii.—Sutherland's Synops. p. 213.

(3) Mit. on Inh. ch. I. sect. xi. 2.

by which ours is, in this respect, regulated.(1) The marriage of a Sudra, indeed, with a woman of the same primitive stock is allowed; and the son born of such marriage is of course capable of inheriting.(2) But, among the other castes, a woman, to be in this respect eligible, must not be descended from the paternal, or maternal ancestors of her proposed husband, within the sixth degree: and, upon the principle (as will hereafter appear) that an *adopted* son identifies, to all intents and purposes, with a *natural* one, it follows that a marriage by such a son, with the daughter of him by whom he has been adopted, would be incompetent,—liable to be regarded as incestuous, like a person marrying his sister. These points were agreed in a late case before the Supreme Court at Madras, after deliberation, and consulting with the Judges and Pundits of the Sudder Dewanny Adawlut at that Presidency; and after obtaining the opinion of the Pundits of the Supreme Court at Calcutta, with those of the most learned native jurists in several of the provinces.(3) Various texts of Menu discountenance the marriage of a younger brother, or sister, before their elder.(4) Distinctions as to caste entering into almost every concern of Hindu life, the important one of marriage has its appropriate forms.(5) Eight

(1) Menu, ch. III. 4, 5.

(2) 3 Dig. 329.—Asiatic Res. vol. v. p. 67.

(3) Saulogrammum Vencataramia Pillay v. Velly-Ummall and others, 3d Term, 1821. Ex relat. Sir E. Stanley, Ch. J.
Datt. Mim. sect. vi. 27. 32.

(4) Menu, ch. III. 154. 160. 170.—Id. ch. XI. 61.
Note to Datt. Mim. sect. vi. 54.—2 Bombay R. p. 533.

(5) Menu, ch. III. 20, et seq.
Yajnyawalcya, 3 Dig. 604.

are enumerated ;—the *Brama*, *Daiva*, *Arsha* (or *Rishis*), *Prajapatya* (or *Caya*), *Asura*, *Gandharva*, *Racshasa*, and *Paisacha*. Of these, the four first, being approved ones, are proper for the Brahmin ; the three next for the other classes; that is, the *Gandharva* and *Racshasa* are permitted to the Cshatrya, or military class, and the *Asura* to the mercantile and servile ones. Such is the usual distribution ; though Menu, as regarding the succession to the property of the woman, received at the time of her marriage in an *unblamed* form, adds the *Gandharva* to the four first.(1) Nuptial rites, accompanying them all,(2) have the effect of distinguishing even the less approved ones from commerce purely illicit, to which otherwise the *Gandharva* and *Racshasa* ones might be assimilated ; the former importing an amorous connexion, founded on reciprocal desire ;(3) the latter, the enjoyment of a captive seized in war ;(4) for whose lot the Mosaic law humanely provided in like manner, by requiring her captor, taken with her beauty, to marry her.(5) Of the *Asura* form, appropriated to the two inferior classes, the characteristic is the payment of money by the bridegroom, to those who give the bride away ; considered to be a sordid proceeding, and, as such, constantly forbidden ;(6) while the *Paisacha*, denoting an advantage taken by a lover of

(1) Menu, ch. IX. 196.
Jim. Vah. ch. V. sect. iii. 3.
(2) Devala, 3 Dig. 606.
(3) Menu, ch. III. 32.—Yajnyawalcya, 3.—3 Dig. 604.
(4) Menu, ch. III. 26. 33.—Yajnyawalcya, 3.—3 Dig. 604
(5) Deut. ch. XXI. v. 10, et seq.
(6) Menu, ch. III. 51.—Id. ch. IX. 98. 100.
2 Dig. 487.

his mistress, when asleep, or otherwise off her guard, prohibited to all, is universally reprobated.(1) Menu, indeed, joins together the *Asura* and *Paisacha*, as never to be used;(2) and it is said in the Digest, consistently with the above remarks, that "at present, the *Brama* nuptials "only are practised by good men;" though it is admitted that the more disapproved forms, as the *Asura*, and the rest, are sometimes resorted to by others:(3) and it is questionable whether, in Southern India, any other form than the *Asura* be now observed.(4) On the solemnization of the marriage, according to the one or the other set, depends, with the estimation of the progeny, the course of descent from the wife, as will appear in treating on widowhood.(5) The bride being known not to be a virgin, the rite is a distinct one; the customary office, founded on the Veda, expressing that "the "*Virgin* (meaning the bride) worships the generous "Sun, in the form of fire;"(6) an invocation, sufficiently denoting the exclusion of one who is not so.(7) Like other institutions of a mixed nature, partaking of religious, as well as civil considerations, the one in question, being duly solemnized, is celebrated with ceremonies,

(1) Menu, ch. III. 34.—3 Dig. 605.

(2) Menu, ch. III. 25.

(3) 3 Dig. 606.—Asiat. Res. vol. vii. p. 311.—C.

(4) Menu, ch. III. 42.

(5) Post, ch. X. p. 249.

(6) Menu, ch. VIII. 226.—Note to Mit. on Inh. ch. I. sect. xi. 19.—3 Dig. 280.

(7) In the Supreme Court at Madras, evidence was given of a species of marriage called *Yellatam*, amounting to a qualified adoption of the bridegroom by the bride's father; and it seemed admitted that some such custom prevailed, though the exact effect of it was not established. Vencataratmam *v.* Vencammall and others. Sup. Court. 2d and 3d Terms, 1824. Ex relatione Ch. J.

the details of which are thus recapitulated in the "Essay" referred to below.(1) "The bridegroom goes "in procession to the house where the bride's father "resides, and is there welcomed as a guest. The "bride is given to him by her father in the form usual "at every solemn donation, and their heads are bound "together with grass. He clothes the bride with an "upper and lower garment; and the skirts of her mantle "and his are tied together. The bridegroom makes "oblations to fire, and the bride drops rice on it, as "an oblation. The bridegroom solemnly takes her "hand in marriage. She treads on a stone and mullar. "They walk round the fire; the bride stepping seven "times, conducted by the bridegroom; and he then "dismisses the spectators, the marriage being now com-"plete and irrevocable." The essence of the rite consists in the consent of the parties, (as with us, formerly, before the marriage act;)—that is, of the man on the one hand, and, on the other, of the father, or whoever else gives away the bride. The union, once effected, involves, I. Reciprocal rights and obligations of a personal nature, as between husband and wife; II. Special rights of property; III. The right of supersession. Of each of these in its order: to which it is proposed to add, IV. A slight comparison of the Hindu law of marriage with other codes, and particularly our own, on the same subject.

(1) Essay on the religious ceremonies of the Hindoos, by Mr. Colebrooke, Asiat. Res. vol. vii. p. 309. For other descriptions of a Hindu marriage, see Dubois, on the Character, Manners, and Customs of the People of India, p. 137. And Append. to this work, p. 61.
Menu, ch. III. v. 55.

I. *Reciprocal rights and duties.*—The right of inheritance, as between husband and wife is, in a great degree, reciprocal; the latter succeeding as heir to the property of her husband, leaving no male issue;—universally, if he died sole and exclusive owner of what he possessed;(1) but with a difference in different parts of India, according to the prevalence of different schools, in the event of his having continued at his death a member of an undivided family.(2) But, where the husband died before consummation, it has been held that his widow is entitled to *maintenance* only.(3) Her title to the inheritance depends upon her having been chaste; adultery subjecting her to degradation from caste, by the loss of which she forfeits her right of inheritance.(4) According to one authority, it puts her life in his power, if committed with a man of low class;(5) and other texts, protective of her person, even in case of infidelity, are said not to apply to the aggravated instance just mentioned.(6) For every unbecoming thought of the kind, there must be expiation;(7) and, wherever the fact have taken place, there ensues for her not only a state of extreme mortification, short of nothing less than the want of necessary subsistence,(8) but it authorizes the husband to take a second, the nuptial tie with the former remain-

(1) Vrihaspati, 3 Dig. 458.
(2) Post, ch. VI. p. 121.
(3) Vencataratnam v. Vencammall and others; Supreme Court, Madras, 1824.
(4) Mit. on Inh. ch. II. sect. i. 39.—Post, p. 163.
(5) Vrihaspati, 2.—2 Dig. 425.
(6) Menu, 2 Dig. 423.—2 Dig. 425.
(7) Menu, ch. IX. 21.—Yajnyawalcya, 2 Dig. 424.
(8) Menu, ch. IX. 30 Id. XI. 177.—Nareda, 2 Dig. 415.—Id. 423.
Yajnyawalcya, 2 Dig. 422.—Vrihaspati Id. 425.

ing undissolved.(1) It may be here noticed, that criminal conversation with another's wife is, with the Hindoos, strictly speaking, a crime, punishable as such; by ignominious tonsure, if committed by a priest; while, in the other classes, it may extend to life; the proof being deducible from circumstances, where direct evidence is not to be had.(2) But, in the King's Courts, it would be actionable, not falling within the description of either of the two subjects, in determining upon which, these are to administer the native law. In examining the part of the law under consideration, it is painful to remark its distrust with regard to female chastity;(3) the deficiency of which, attributed by it to the constitution of the sex, may, if it exist, be more justly ascribed perhaps to their ill-proportioned marriages, in point of relative age;—not to mention with regard to women, the peculiar constraint attending their domestic lot.(4) Liable, as the wife is, to be coerced and abandoned for misconduct, desertion of a blameless one, beside being punishable in the husband, entitles her to a third of his property as a separate maintenance;(5) Menu exacting for her the utmost benevolence,(6) while he enjoins to

(1) Dubois, p. 136.
(2) Menu, ch. VIII. 352 to 362.
Id. 371 to 385.
Post, Append. to ch. II. p. 40 to 44.
Note a case of the kind, in the Sudr. Adalut at Bombay, in which damages were recovered. 1 Bombay R. p. 353.
(3) Menu, ch. IX. v. 1 to 18.—2 Dig. 382.
Also the twelve *Slocums*, extracted from the Mahabharata, 2 Dig. 393.
(4) Sancha and Lichita, 2 Dig. 430, 431.
(5) Menu, ch. VIII. 389.—Nareda, 2 Dig. 413.
Yajnyawalcya, Id. 420.
Post, Append. to ch. IV. p. 45. 47, 48.
(6) Menu, ch. III. v. 55 to 59.

both reciprocal constancy as their supreme law,(1) and mutual content as the indispensable condition of their happiness.(2) Other causes, as well as infidelity, operating to disappoint the primary object of marriage, lead to separation; such as confirmed barrenness in the woman, and corporal imbecility in the man; with loathsome, or incurable disease in either.(3) For a summary of these, recourse must be had to the references below;(4) upon which it may be observed what a latitude is given for the will and caprice of the husband, wherever there exists in him a disposition to take advantage of the letter of the law.(5) A husband moreover having provided for his wife, in the event of his necessary absence abroad, different periods are indicated, (according as he has, or has not, been heard of,) during which she is to wait his return with patience,—notwithstanding that "long absence is considered by sages as equivalent to natural "death;"(6) as well as that "the natural passion implanted in the human race by the Divinity, is not to "be endured."(7) But the texts of Devala, referred to,(8) are considered as regarding past ages, not the present; and, at all events, not as legalising the act, but only as averting a consequent fine to the king; as

(1) Menu, ch. IX. 101, 102.—Culluca Bhatta, 2 Dig. 497.

(2) Menu, ch. III. 60.—2 Dig. 401, 402.

(3) Menu, ch. IX. 81.—2 Dig. 419.—Devala, Id. 414. 470.
Yajnyawalcya, 2 Dig. 418.
Post, Append. to ch. II. p. 52, 53.

(4) Menu, ch. IX. 74, 75.—Yajnyawalcya, 2 Dig. 450.

(5) Menu, ch. IX. 76.—Devala, 2 Dig. 470, 471.

(6) 2 Dig. 472.

(7) 2 Dig. 386.

(8) 2 Dig. p. 471.

our statute of James against bigamy, under similar circumstances, excuses the felony it creates, avoiding at the same time the attempt at a second marriage. Subtraction of conjugal rights is denounced on either side with heavy penalties;([1]) and the relative duty, of constantly maintaining one another, is alike inculcated.([2]) The early codes of all nations seem to have subjected the wife, among other members of a man's family, to corporal chastisement; the civil law, to the extent of allowing the husband, for some misdemeanours, *flagellis et fustibus acriter eam verberare*,—for others, *modicam castigationem adhibere*. Our own gave the like permission, restricted only within somewhat more reasonable bounds;—and Menu, whether he set, or only followed the unmanly example, certainly includes the wife among objects of domestic discipline, when conceived to deserve it. Less brutal indeed, in this respect, than the civil law, with him the authorised instrument is, "a small "shoot of a cane;" to which truth, however, compels to be added, the option of "a rope;"—the correction however to be inflicted "on the back part only of the body, "and not on a noble part, by any means."([3]) For what sort of delinquencies such barbarism might be indulged, may be collected perhaps out of an extract from Harita,([4]) with the comment on that citation. But, for

(1) Menu, ch. IX. 4.—Id. 2 Dig. 416.
Vrihaspati, 2 Dig. 386.—Smriti, Id. 425.

(2) Menu, ch. VIII. 389.—3 Dig. 406. 460.—Id. 26.

(3) Menu, 2 Dig. 209.—Id. 441.—Menu, ch. IX. 290.
Culluca Bhatta, 2 Dig. 421.
1 Bombay R. p. 371, note.

(4) 2 Dig. 433, et seq.

the credit of Hindu law, a maxim, of authority deemed to be equivalent to that of Menu, says beautifully, "strike not, *even with a blossom*, a wife guilty of a "hundred faults."(1) And it may be confidently assumed that, at this day, in no British Court, administering whether the English or the Hindu law, would the claim be tolerated for an instant, justifying so much as the lifting up a finger against a woman, any more than that of "slaying or mutilating her;" which, in the case of a wife, the latter may be said always to have prohibited.(2)

II. *Special rights of property.*—Though a wife be one of three persons declared to have in general no wealth exclusively their own, the position is modified by the authority that lays it down;(3)—and it is certain that, beside the contingency of her succeeding as heir to her husband, a Hindu wife has present rights of property, of two kinds:—1. That *Stridhana*, which being, generally speaking, exclusively hers, has already been treated of at large, under the title of *property*;(4) and to which there will be occasion to recur, in describing its descent.(5) 2. Whatever is not *Stridhana* is possessed by the wife, subject to the direct and unlimited control of her husband. This, upon the preponderance of authorities, may be taken to comprehend what she acquires by her

(1) Note to 2 Dig. 209.
(2) Menu, 2 Dig. 423.
(3) Menu, ch. VIII. 416.—2 Dig. 249.
(4) Ante, p. 25.
(5) Post, p. 246.

industry,[1] together with what she obtains from strangers, or inherits, on failure of nearer heirs.[2] It has already been stated, with regard to what devolves on her by inheritance, that the rule as to her property in it is not uniform in the different schools;[3] while, with respect to the other two sources just mentioned, Jagannatha [4] observes, that "no argument is found to shew, "why a woman should not have independant power "over that which she has gained by arts, or which has "been given to her by a stranger on a religious consi-"deration, or through friendship, but should have inde-"pendant power over that which was received as a "*bribe;*"—alluding to the instance N° 2, in the preceding enumeration of *Stridhana.*[5] It is necessary also, in every case of ornaments belonging to her, to distinguish between such as were given to her by her husband, or some of her relations, on, before, or connected with her marriage, and those worn by her occasionally, not having been so given; the latter not being her property, but her husband's descendible to his heirs, she surviving him, and divisible among them on partition: but it is otherwise if they were habitually worn by her; since this would imply that they were hers; in which case, they are not partible.[6]

(1) Menu, ch. VIII. 416.
2 Dig. 249.—3 Id. 566.

(2) 3 Dig. 566, et seq.

(3) Ante, p. 31.

(4) 2 Dig. 570.

(5) Ante, p. 29.

(6) Menu, ch. IX. 200.—3 Dig. 571.—Apastamba, 3 Dig. 570.
Devala, Id. 577. 469.—Mit. on Inh. ch. I. sect. iv. 19.
Post, p. 211. and Append. to ch. II. p. 54.

Of her property, of whatever kind, she dying in the life of her husband, it is a general rule, that, if she die without issue, it goes to her husband, or his nearest kinsmen (*sapindas*), allied by funeral oblations, provided the marriage was in an approved form; if otherwise, to her father.(1) But Jimuta Vahana and Jagannatha say, that the rule applies to that part of her property only which is acquired at the time of her marriage;(2) while Vijnyaneswara, the Madhavya, and other southern authorities are silent as to any such distinction. Leaving issue, it will go to her immediate female descendants, whether daughters, or grand-daughters,— the grand-daughters taking *per stirpes;* the unmarried, and unendowed, of the one, or the other, taking first. Where there are both daughters and grand-daughters, it vests in the daughters exclusively, subject to such a provision for grand-daughters, as usage may warrant.(3) Daughters take equally, subject to the above distinction of married and unmarried; failing female issue, sons and grandsons succeed; and, failing the latter, the husband and his relatives.(4) What is called the wife's *fee*, or gratuity, goes, by way of exception, to her brothers of the whole blood.(5) So much, with regard to the descent of the property of the wife, dying in the life of the

(1) Menu, ch. IX. 196.
Yajnyawalcya, 3 Dig. 606.—Nareda, Id. 608.
Mit. on Inh. ch. II. sect. xi. 10, et seq.
Post, Append. to ch. II. p. 57.

(2) 3 Dig. 608, 609.

(3) Menu, ch. IX. 193.—3 Dig. 600.
Mit. on Inh. ch. II. sect. xi. 17.

(4) Mit. on Inh. ch. II. sect. xi. 24, 25.

(5) Id. sect. xi. 14.—Ante, p. 29.

husband. For her rights, as heir to him, he dying first, they enter more properly into the chapter on Inheritance.(1) And the descent of the widow's is reserved for the chapter on Widowhood.(2)

III. Marriage having taken place, it would seem, as if the right of divorce was, in general, by the Hindu law, as it is by our own, marital only;—not competent to the wife, unless by custom, in contradistinction to the Shaster;(3)—a point, upon which the castes, in their assemblies, are more in a course of exercising jurisdiction, than our Courts; nor is there much to be collected on the subject, from any work in print. The exception may be regarded as proving the rule; there being castes, (of the lowest kind indeed,) in which not only is divorce attainable on either side, but where, having taken place, the woman may marry again; which, it has been seen, she cannot in general do. Such marriage is called *Natra*,(4) being in familiar use at Bombay.

II. *The right of Supersession.*—It remains to consider the doctrine of Supersession; by virtue of which, though the woman can marry but once,—to the man, a plurality of wives at the same time is competent; though not at his mere pleasure;—the attempt, which is *justifiable* in some instances, in others only *admissible*, being, where it can neither be justified, nor tolerated, *illegal*.(5)

(1) Post, ch. VI. p. 184.
(2) Post, ch. X. p. 248.
(3) 1 Bombay R. p. 410.—Id. p. 337.
(4) Id. p. 59.
(5) Note to Mit. on Inh. ch. II. sect. xi. 2. 34.

1. The grounds, that justify it, regard the conduct, the temper, or the health of the wife; to which may be added, barrenness, or, during a period of ten years, the production only of daughters.(1) In any of these cases, cheerful acquiescence on her part entitles her to be treated with proportionable liberality; while contumacious resistance subjects her to coercion, to public exposure, nay, even to the discipline of the rope.(2) 2. Upon the principle of *volenti non fit injuria*, the first wife's *assent* supplies the want of a justifiable cause, as may be collected from various passages, indicating the means of obtaining it, and reconciling her to the intended purpose, by a suitable settlement;(3) the measure of which is differently defined;(4) the most intelligible one being "a compensation, amounting, with her previous *Stri-dhana*, to a value equivalent to the expenses of the second marriage." Such is the one adopted by Mr. Colebrooke;(5) while Jagannatha, on a review of the several criteria proposed by different authors, conceiving the best to be illusory, concludes that a rule on the subject remains yet to be formed, on due consideration of the

(1) Menu, ch. IX. 80, 81.
Devala, 2 Dig. 414.—Id. 417.
Rammohun Roy's "Brief Remarks," p. 8.

(2) Menu, ch. IX. 83.—Culluca Bhatta, 2 Dig. 421.
Ante, p. 48.

(3) Jim. Vah. ch. IV. sect. i. 14.
Mit. on Inh. ch. II. sect. xi. 34, 35.
Yajnyawalcya, 3 Dig. 558.
Post, Append. to ch. II. p. 58.

(4) Yajnyawalcya, 3 Dig. 17. 561.
Sricrishna Tercalancara, and Vijnyaneswara, 3 Dig. 18.
Mit. on Inh. ch. II. sect. xi. 34, 35.

(5) Post, Append. to ch. II. p. 51.—C.

difficulties attending it.(1) That, in estimating it, account is to be taken of what she already possesses, and that the difference only is to be given her, all are agreed; and, if the difference be the other way, then a trifle only, for form's sake.(2)—This *present*, (as it is called,) however settled, classes as *Stridhana*, as has been already noticed. (3) 3. *Illegal* supersession, is the abandoning, with a view to another, a blameless and efficient wife, who has given neither cause nor assent;—a conduct, for which the husband (says Nareda) (4) shall be brought to his senses by the king, "with a severe chastisement;" the same doctrine being held by Vishnu, (5) the Smriti Chandrica, (6) and other authorities; the desertion of a woman by her husband for any offence whatever, less than actual adultery, having been declared by an anonymous *Smriti*, to be among the parts of ancient law, that were abrogated at the beginning of the present age. (7) A wife superseded, under whatever circumstances, must be provided for; (8) a benefit that is construed by the Pundits as rendering it imperative upon her to continue to reside in the house with her husband, his fickleness not absolving her from her nuptial obligation. And, under

(1) 3 Dig. 562.
(2) Id. and Daya Cr. Sangraha, ch. VI. 28, et seq.
(3) Ante, p. 30.
(4) 2 Dig. 413.
(5) 2 Dig. 414.
(6) Post, Append. to ch. II. p. 45. 48.—C.
(7) General note, end of translation of Menu, p. 355.
(8) Culluca Bhatta, 2 Dig. 412.
Yajnyawalcya.—Id. 421.

whatever circumstances she live apart from him, it is her duty to seek protection from his relations, and, failing them, from her own.(1) "But, after all," (says Dacsha, very feelingly,) "with sorrow does he eat, who "has two contentious wives."(2) To avoid one obvious ground of difference among them, where a plurality exists, the important point of precedency among them is settled by law. While the practice existed of contracting marriages in different classes, it was according to the order of class; the wife of the same class with the husband ranked before all the others;—dignity of class prevailing against the influence of more youthful charms, and a later selection. Her pretension consisted in the privilege of personal attendance on her husband, notwithstanding her supersession, and in performance of the daily business relating to acts of religion;—objects, in the discharge of which it would have been discreditable to have suffered the wife of an inferior one to intermeddle. The latter indeed were rather in the nature of *Concubines*, being described by distinct appellatives. At least they were not regarded as possessing the rank of regular wives, the law distinguishing between the wife, and the espoused woman.(3)—Like the concubine among the old Romans, described as *quam quis non mariti animo, sed concubitûs causâ, sine stupri tamen crimine flagitiove, domi habet;* the connexion

(1) Post, ch. X. p. 244.
(2) 2 Dig. 411.
(3) Menu, ch. IX. 85—87.—Id. ch. III. 17—19.
Nareda, as referred to in Jim. Vah. ch. XI. sect. i. 48. 49.
Mit. on Inh. ch. II. sect. i. 7. 28.
3 Dig. 484, et seq.

constituting among them a sort of left-handed matrimony, as contra-distinguished from *nuptial*, or lawful wedlock—the countenance given to which has been considered as approaching very near the polygamy of other nations.(1) But this confusion of classes by intermarriages has long since ceased; (2) and now that the parties must necessarily be of the same class, the one first married is the one to be still honoured, not having been superseded for any fault.(3) Other rules of preference are laid down, applicable to particular cases; but, in general, the *elder* wife, as she is called, takes the lead; elder, not necessarily in years, but according to priority of nuptials:(4) her husband's union with her being considered in law as having proceeded from a sense of duty, while his marriage with any other, she living, is referred rather to an impulse of passion.(5) How many it is competent for a Hindoo to have at one and the same time, does not distinctly appear.(6) She it is, (the elder, or first,) that succeeds eventually to her husband as heir, (7) maintaining the others, who inherit in their turn on her death; or even during her life, in the event of her degradation, or the like;—possessing, as they do, a capacity for the performance of religious ceremonies; being the consideration upon

(1) Elements of Civil Law, p. 265.
(2) Ante, p. 40.
(3) Yajnyawalcya, 2 Dig. 405, and note to Id. 406. Post. ch. VI. p. 137.
(4) Catyayana, 2 Dig. 407.—Gen. ch. XVI.
(5) Note to 2 Dig. 406.—Dacsha, 2 Dig. 409.—Post, ch. VI. p. 136.
(6) Note to Jim. Vah. ch. IX. 6.—3 Dig. 114, 115.
(7) Post, ch. VI. p. 136.—Qu. tam. It being asserted by a respectable Sastree, that the property of the deceased husband is distributable equally among them; for which he cites the *Venyachary Myoohha.*

which the widow, as well as the son, is preferred in inheritance. (1) Such are the topics controvertible among the Hindoos, between husband and wife. Infinitely delicate in their nature, judicial interference with them is far from being encouraged by their law,(2) the spirit of which, in this respect, has been virtually adopted by our own, in the enactments of the Charters and Acts of Parliament for India. But, however uncreditable or unbecoming such litigation may be, it is certain an action would be maintainable in a Native Court, by a Hindu wife against her husband, to recover ornaments illegally withheld ;(3) nor can it be doubted but that, as in our King's Bench, so in the King's Courts in India, *articles* might be exhibited by her against him ; the Court, in the exercise of its juris diction between them, having regard always to the acknowledged authority, according to their own law, as recognised by ours, of the *Master of a family*.

IV. The comparison intended here between the Hindu and other codes, our own especially, on the subject under consideration, having been in some degree incidentally anticipated, a few additional remarks will suffice, to answer the proposed purpose of illustration. The requisition of the Hindu legislator, that fidelity between man and wife should be mutual, was equitably and generously inculcated by the Civil law, directing that "*judex adulterii* " *ante oculos habere debet, et inquirere, an maritus, pudicè*

(1) Mit. on Inh. note to ch. II. sect. i. 5.
(2) *Smriti* ; 2 Dig. 208, with the note.—Id. 377.
(3) 2 Dig. 378.—Post, Append. to ch. II. p. 59.—E. 2 Bombay R. p. 440.

"*vivens, mulieri quoque bonos mores colendi autor fuerit:*" adding, "*periniquum enim videtur esse, ut pudicitiam vir* "*ab uxore exigat, quam ipse non exhibeat.*" Upon which principle it is, that a husband cannot obtain a divorce in the English Ecclesiastical Courts for the adultery of his wife, she recriminating with effect. On the other hand, if the Hindu law allows subsistence to an adulterous wife, it is in this respect more liberal toward her than the English would be; which, in case of divorce by the Ecclesiastical Court for adultery, refuses her alimony, as it forfeits to her also her right to dower after her husband's death. The difference between the two codes, in the manner of viewing and treating the act of criminal conversation with another's wife, the one proceeding against it as a crime, the other regarding it as a private injury only, to be compensated by damages, has already been noticed: but it is here to be observed, that the remark is true as applicable to the temporal Courts only; —the spiritual ones in England taking cognizance of it as an offence, with a sparingness however in point of penalty, according to the provisions of the Canon law, that has been attributed to the constrained celibacy of its first compilers; so that it meets with its most effectual corrective, after all, at the hands of a jury at the common law, in an action of trespass. For infidelity, or other ill usage on the part of the husband, destructive of domestic happiness, the English wife has her remedy in the last mentioned Courts; which have jurisdiction, in case of divorce, to provide for her out of his funds, according to her rank and condition in life, the means of her hus-

band, and the circumstances of the case; whence, upon the whole, it would appear, that a considerable analogy exists between the Hindu and the English law, upon this delicate subject.

An English wife does in no case inherit to her husband; and here, therefore, the Hindoo possesses an advantage over her; as she does perhaps also in the law of maintenance generally, (1) as likewise of *Stridhana*, or a Hindu woman's exclusive property; to which the *paraphernalia* of an English one bears an imperfect resemblance;—*pin-money* bearing none, being matter of contract and settlement.

For the law of *polygamy*, of which the practice is so familiar among the Hindoos, it admits of less comparison. Not prohibited merely, the thing is with us a crime, punishable as felony: and, even among the Hindoos, it appears to be sanctioned with considerable reserve, principally where the failure of legitimate male issue (with them the indispensable end of marriage) seems otherwise, upon reasonable grounds, to be apprehended. Introduced into the world before the deluge, it was in use among the Jews, though not explicitly allowed by their law; the first instance of it upon record, that of *Lamech*, one of the descendants of Cain, having always been considered as a departure from the original institution of marriage, as ordained to our first parents; (2) and it was forbidden by Christianity, that

(1) Post, ch. VIII. p. 171.
(2) Levit. ch. XVIII. 18.—Deut. XXI. 16.
2 Sam. XII. 8.—Gen. IV. 19.—Id. II. 24.

republication of the pure and undefiled law of nature. The Mahomedans in this respect imitate the Jews. "*Apud Græcos aut Romanos*, (says Selden,(1)) *rara quidem Polygamia, seu legitimarum, seu justarum uxor m plurium simul exempla.*" How *concubinage* prevailed among the Romans, till prohibited by the imperial Constitutions, has already appeared. And if, among the Greeks, a wife could not be *superseded*, as she may be among the Hindoos, too much at the pleasure of the husband, an Athenian one might be *bequeathed* by will, as appears by the bequest of one, of which the form is given by Sir William Jones, in his commentary on *Isæus*.(2)

Not only have the Acts and Charters for the King's Courts in India prescribed, as the rule of determination between native and native, the *native* law, in all matters coming before them of *Contract* and *Inheritance*, but, in providing for their modes of proceeding, they have been careful to enjoin, generally, wherever the Natives are concerned, an especial attention to their *religion, manners, and usages.* These Courts exercising their jurisdiction in towns overflowing with native population, such a deference to local and ancient institutions was dictated alike by policy and justice. And the same considerations applying with increased force to the Company's, dispersed in the interior, where the population is wholly of this description, hence the necessity of some attention being paid by us to the In-

(1) De jure Nat. et Gent. juxta disciplinam Hebræorum, lib. v. c. 6.
(2) P. 177. 4to. edit. 1779.

dian codes, and particularly to that of the Hindoos. And, though marriage, with the relations of man and wife, be not among the titles specially committed to us by those Charters, to be determined according to the law of the parties, and though the differences arising from these relations will often be of a kind with which the less we interfere, the better, (1) it is obvious that a suit for the *inheritance* may turn upon a question, belonging to the subject, of which it has been the business of the preceding pages to exhibit a view;—a question, therefore, that even the King's Courts may have incidentally to decide; in which, with the exception of the titles that have been specified,—upon all others, unconnected with them, the Native, equally with the British inhabitant, is, in general, at the several Presidencies, bound by the English law.

(1) Post, Append. to ch. II. p. 59.—E.

CHAP. III.

ON THE PATERNAL RELATION.

THE primary object of marriage, with the people in question, being the birth of a son, or sons, (the importance of which will be more particularly seen in the next chapter)—this expectation having been realised, and a family thereby constituted, the course of the subject leads to an inquiry into the dominion over it of a Hindu father; and, as power and protection are correlative, its rights, as well as reciprocal duties, will come also to be noticed. But, to give to the subject its necessary extension, it will be proper to regard *family* in an enlarged sense; as comprehending, not only wife and children, but various connected and dependant females, such as unmarried, and widowed sisters, widowed daughters-in-law, mother, and the like; all entering generally, among the Hindoos, more or less, into its composition—to say nothing of *slaves;* the whole forming in the aggregate, and in the abstract idea at least of the subject, a truly patriarchal republic. What concerns the wife having already occupied its proportion of the chapter on marriage,(1) the interests of the various other females alluded to, will find their proper place, when treating on inheritance, and matters connected

(1) Ante, ch. II. p. 35.

directly with that title; and the subject of *slaves*, (but too prevalent in India,) will, from its importance, be reserved for a distinct chapter;(1)—it being intended, in the present, to discuss chiefly the paternal relation, strictly so considered; which will be done with reference, first, to property, next as to the power a Hindu father has over his issue; adding, thirdly, a few observations on the reciprocal duties of parent and child, distinguishing between legitimate and illegitimate; together with, fourthly, some notice of the established substitution for a father, in the representative character of a *guardian*.

I. With respect to the dominion of the father over the family property, including what in a peculiar manner belongs to the wife, the subject having been anticipated in treating on property generally,(2) it will be sufficient to remark here, that his power to dispose of it being liable in general to the obligation of providing for the subsistence of his family, and, with regard to that part of it consisting of land, or other possessions partaking in point of law of the nature of land, to the control of his sons, as well as to specific rights in it vested by birth, in the event of its under-going a partition in his lifetime,(3) it would seem but reasonable that he should have a co-ordinate interest, in any which they may acquire, while their connexion, as members of the same family, continues.(4) It is accordingly laid down by

(1) Ch. V. p. 167.
(2) Ante, ch. I. p. 26.
(3) Ante, p. 17, et seq.
(4) 3 Dig. 55.

Menu and others,(1) that they can, in general, have no wealth of their own, any more than a wife, or a slave; whatever they may earn being regularly acquired for him, to whom they belong: whence it is the advice of Catyayana, not to lend any thing to women, slaves, or children.(2) Our own law makes a similar provision; as did the Roman also, namely, that the parent should have the benefit of his children's gains, while they live with him; being no more indeed than what nature and justice alike dictate, as a return for the maintenance and protection they enjoy, under the paternal roof. But, as it has been seen, that a Hindu wife has independant property peculiar to her,(3) so, with regard as well to the son, as the slave, the position of Menu is to be taken, as it purports indeed, to be only a general one, not intended to exclude special rights; and, as the doctrine of the Roman law, in this respect, was, in effect, almost superseded by its doctrine of *peculium*, (a fiction, entitling the son to whatever he might acquire by a variety of means, civil, as well as military,) so does the Hindu principle admit of a similar modification; the position, that a father is proprietor, and master of the acquisitions of his sons, as a universal one, having been negatived, in cases, where it appeared that those acquisitions had been made distinct and independant, as well of the father personally, as of any property belonging to him.(4)

(1) Menu, ch. VIII. 416.—Nareda, 2 Dig. 249.—3 Id. 70.

(2) 1 Dig. 16.

(3) Ante, p 26.

(4) Soobun's Lal v. Hurbun's Lal; Beng. Rep. 1805. p. 7. Brij. Retun Das v. Brij. Pal Das; Id. 1807. p. 105. 2 Dig. 544, 545.

Of such acquisitions Menu reckons up seven distinct means, accounted *virtuous;* by which is to be understood, competent to a Brahmin;(1) to the extent of which, what a son has acquired, by his own unassisted exertions, he may give away;(2) implying that it is his. Nor is the right confined to the Brahmins:—it extends to the other castes, according to the appropriate modes, by which they also may respectively become possessed of property;(3) and the consistency of it, in the case of sons, is argued from the duties prescribed to them by religion, inducing a greater or less disbursement; to the performance of which, therefore, in every instance, property is indispensable.(4)

With regard to a *partition* of the father's property in his lifetime, being in general optional with him, it is, in some circumstances, compulsory; but obtaining, as it does, more frequently after his death, a connected view of it, with reference to either period, will be reserved for a distinct chapter,(5) following the chapter on Inheritance, being incident to the right of succession, on the decease of the ancestor.

II. As to the power of the father over the persons of his children, he has the ordinary one of moderate correction,(6) with the usual one of selling them;(7) if,

(1) Menu, ch. X. 115.—2 Dig. 135, et seq.—Post, p. 310.
(2) 3 Dig. 156. 544.
(3) Menu, ch. X. 116.—Id. 74, et seq.—2 Dig. 136.
(4) Jim. Vah. ch. I. 17.—3 Dig. 71.
(5) Post, ch. IX. p. 176.
(6) Menu, 2 Dig. 209.—Menu, ch. XI. 35.
(7) Vasishta, 2 Dig. 108.—3 Id. 242.—Post, ch. V. 107.

by that, more be meant, than the power that existed by the ancient law, of selling a son, for adoption by the purchaser.(1) That the Hindoos are in the practice of selling their children, particularly in seasons of distress, (which was the plea with the Romans also,) is certain;(2) as well as that there are texts to warrant it; though not one that does not stipulate, as essential to the validity of the sale, not only the existence of distress, but assent also of the party interested: without the concurrence of both, by some texts it is forbidden; upon which it is said that, though prohibited, the sale is not therefore void, according to the distinction prevalent in the Bengal school;(3)—but Yajnyawalcya, whose doctrines prevail to the southward, declaring the power that distress gives to the head of a family, in alienating its property, excepts the *son*, as well as the *wife*, from its operation;(4) and we have the authority of Sir W. Jones for an order of the Bengal government against it; purporting to have been made after consultation with the most respectable Hindoos on the spot, "who condemned such a traffic, as repugnant to their Sastra."(5)

III. The reciprocal duties of parent and child are sufficiently obvious, consisting in general of protection on the one hand, and of submission and reverence, in-

(1) Post, p. 102.
(2) Post, p. 109.
(3) Catyayana, Datt. Mim. sect. iv. 47.—2 Dig. 105.
(4) 2 Dig. 128.—Id. 533.
(5) Charge to the Grand Jury of Calcutta, delivered by Sir William Jones, June 10, 1785. See his Works— and post, p. 107.

cluding also protection, (where it may become necessary), on the other. Protection implies maintenance, the obligation to which, as between parent and child, is eventually mutual; it being equally incumbent on sons, to take care that their parent shall not want, as it is on the latter to provide for his children. Maintenance by a man of his dependants is, with the Hindoos, a primary duty. They hold, that he must be just, before he is generous, his charity beginning at home; and that even *sacrifice* is mockery, if to the injury of those whom he is bound to maintain.(1) Nor of his duty in this respect are his children the only objects, co-extensive as it is with his family, whatever be its composition, as consisting of other relations and connexions, including (it may be) illegitimate offspring.(2) It extends to the outcaste, if not to the adulterous wife; not to mention such as are excluded from the inheritance, whether through their fault, or their misfortune; all being entitled to be maintained with food and raiment at least, under the severest sanctions.(3) A benevolent injunction! existing at no time ever to the same extent under our own law; which professes little of the kind, since the time that it has been competent with us for a man to dispose by will of the whole of his property, real and personal,

(1) Menu, ch. XI. 9, 10.
(2) See next page.
(3) Menu, ch. IX. 202.—3 Dig. 520.
Mit. on Inh. ch. II. sect. x. 1. 5. 12—15.
Jim. Vab. ch. V. 11, excepts the outcaste.
Devala, 3 Dig. 504.
Vishnu, Id. 316.
Post, ch. VII. p. 152, and ch. VIII. p. 174.

without regard to the natural claims of wife and issue, to say nothing of more distant ties; a latitude, not approved by the author of the Commentaries; who, in noticing the power of the parent so to disinherit his children, thought it had not been amiss, if he had been bound to leave them at least a necessary subsistence;(1) —or, as the same sentiment has been expressed, in their peculiar manner, by the highest Hindu authorities, "Who leaves his family naked and unfed, may taste "honey at first, but shall afterwards find it poison."(2) The obligation extends, under particular circumstances, to responsibility for each others' debts, in a degree unknown to our law, as will be subsequently seen.(3)

The providence of the law thus including such children as are illegitimate, it is proper here to consider these. An illegitimate child may be described to be the offspring of a woman, not legally married to the putative father; the definition extending to the case, where the man and woman are descended from the same stock, or, where the marriage has not been according to the order of class.(4) But it has been contended, that illegitimacy can only result from an irregular intercourse with a *Sudra* woman; and that, as between a man and a virgin of the *same caste*, the act of connexion is equivalent to the ceremonies of marriage;(5) of which a

(1) Blackst. Comm. vol. 1. p. 450, 12th edit. 8vo.
(2) Vribaspati, 2 Dig. 131.—Menu, ch. XI. 9.
(3) Post, p. 166. 191.
Post, Append. to ch. III. p. 78.—C.
(4) Ante, p. 39.—Menu, ch. III. 4, 5.
Catyayana, 3 Dig. 325. 327. 330.
(5) Post, Append. to ch. III. p. 65.

Gandharva marriage is referred to as a proof.(1) It is the sixth in the order of marriages, and the second of the base forms, permitted anciently for the military; being described as "contracted for the purpose of "amorous embraces, and proceeding from sensual gra-"tification;"(2) whereas, the first legitimate marriage of every Hindoo is presumed to originate, and proceed, from a sense of duty.(3) But, admitting the loose principle of the *Gandharva* marriage, (subsisting in practice, though disapproved,) (4) it does not establish the position, for which it is adduced; since, even for it, nuptial rites are necessary.(5) It is true, that the law, in providing for illegitimate children, seems to have had in contemplation only the Sudra class:(6) and it has arisen probably from the contempt in which this is held by it, that, as among Sudras, it makes comparatively but little difference, whether the offspring be legitimate, or illegitimate; the latter, as well as the former, being admissible to shares, on partition by the father; and to the inheritance, on his death;—only not to the same extent with his lawful sons, born in wedlock, and liable to be postponed to legitimate daughters and their sons.(7)

(1) Post, Append. to ch. III. p. 68.
(2) Menu, ch. III. 21. 26. 32.—Yajnyawalcya, 3 Dig. 604.
Ante, ch. II. p. 42.
(3) 2 Dig. 409.—Ante, p. 56.
(4) 3 Dig. 606.
(5) Devala, 3 Dig. 606.
(6) Mit. on Inh. ch. I. sect. xii.—Yajnyawalcya, 3 Dig. 143.
Post, Append. to ch. III. p. 70.
(7) Mit. on Inh. ch. I. sect. xii.
Jim. Vah. ch. IX. 29, et seq.
Datt. Chandr. sect. v. 30, et seq.

And, nothing appearing to the contrary, it is to be inferred, that where illegitimate sons succeed to their father, the brothers, though illegitimate, will succeed to each other, living and dying undivided. Whereas, by our law, a bastard can *acquire* only; he cannot *inherit* from any one. The fruit of any other connexion with a Sudra woman, than that of a man of her own class, must necessarily be illegitimate, marriage between individuals of different tribes being legally impossible; and, how despicably such progeny was regarded, in ancient times, may be learnt from Menu, who describes it as "a corpse, though alive;"—and "thence called in law, "a living corpse;"(1) the reason assigned for which is, that, though such a son confers some benefit on his supposed father, it is but inconsiderable.(2) It is of such offspring by "a man of the *priestly* class," that this is predicated by Menu; but the Mitacshara speaks of it as "by a man of a *regenerate* tribe" generally;(3) and "a man of the priestly class," in the text of Menu, is expressly said to signify a *Brahmana*, *Cshatrya*, or *Vaisya*.(4) That a progeny, so estimated, should be barely admissible to the benefit of simple maintenance, and this too depending on the *docility* of the claimant,(5) cannot be wondered at. The inconvenience, arising from so indefinite a condition, is well obviated by a sensible living expositor, who observes that "a court

(1) Menu, ch. IX. 178.—Baudhayana, 3 Dig. 283.
(2) 3 Dig. 144.
(3) Mit. on Inh. ch. I. sect. xii. 3.
(4) 3 Dig. 284, and ante, p. 39, note.
(5) Mit. on Inh. ch. I. sect. xii. 3.

" would presume a natural son qualified to receive " maintenance, unless the opposing party could shew " what, in the contemplation of the law, is a legal dis- " qualification."(1) It is clear, however, that as illegitimacy exists among Sudras, so neither is it confined to that class; the difference being, that, in the regenerated tribes generally, its claim, at the present day, is to maintenance only, unless where custom has perpetuated to it rights of inheritance, such as subsisted under the ancient law, become, to the subject at large, long since obsolete.(2) Nor are authorities wanting, that assign to the mothers of such children, the like provision.(3)

IV. With respect to the relation of *guardian* and *ward*, the King, as he is, by the Hindu law, failing all others, the ultimate heir of all, Brahmins excepted,(4) so is he, to an extent beyond what is recognized by us in our Court of Chancery, the universal superintendant of those, who cannot take care of themselves. In this capacity, it rests with him, *i. e.* with the judicial power, exercising for him this branch of his prerogative, to select for the office the fittest among the infant's relations; preferring always the paternal male kindred to a maternal ancestor, or female.(5) It is stated that, in practice, the mother is

(1) Post, Append. to ch. III. p. 71.—S.
(2) Mohun Sing *v.* Cumun Rai; Beng. Rep. ante 1805. p. 30.
(3) Jim. Vah. ch. XI. sect. i. 48, et seq.
Mit. on Inh. ch. II. sect. i. 7. 20. 28.
(4) Post, p. 149.
(5) Menu, ch. VIII. 27.—3 Dig. 542, et seq.
Post, Append. to ch. III. p. 73. 74. 75.—C.

the guardian;[1] but, as a Hindu widow is herself liable to the same sort of tutelage,[2] it is more correct to regard her as proper, if capable, to be consulted on the appointment of one;—and, if of competent understanding, the concurrence of the minor himself is not to be disregarded;[3] all which only shews how much the choice is a matter of sound discretion. Belonging to any of the three superior classes, the youth ceases to be in ward upon his ending his studentship, and returning home from his preceptor; if a Sudra, upon his completing his sixteenth year.[4] During his minority, he may sue, or defend by his guardian;[5] who, for abuse of his trust, is removeable.[6]

(1) 3 Dig. 544.
(2) Post, p. 244.
(3) 2 Dig. p. 543.
(4) Menu, ch. VIII. 27.—1 Dig. 293.
Post, Append. to ch. III. p. 76, 77.—C.
(5) Post, Append. to ch. III. p. 79, 80, 81.
(6) Id. Append. to ch. VIII. p. 305.—C.

CHAP. IV.

ON ADOPTION.

Having in the two preceding chapters, treated of marriage and its incidents, as between husband and wife, and parent and child, together with the substituted relation of guardian and ward, the state of widowhood, peculiar as it is among the Hindoos, would seem to offer itself next to our consideration. But as this must include an account of succession to whatever property a widow may have possessed, whether during, or subsequent to her coverture, it will be more intelligible, if reserved till after the general law of inheritance shall have been discussed; and the present chapter will be more conveniently appropriated to the subject of *adoption*, on failure of male issue;—the future beatitude of the Hindoo depending, according to the prevalent superstition, upon the performance of his obsequies, (1) and payment of his debts, by a son,(2)—as the means of redeeming him from an instant state of suffering after death.—The dread is, of a place called *Put*;(3) a place of horror, to which the manes

(1) For an account of these, see note to Datt. Mim. sect. iv. 72, and note to Datt. Chandr. sect. i. 24.

(2) Nareda, 1 Dig. 291.—Id. 320, et seq.

(3) Menu, ch. IX. 138.—Id. IV. 88, 89.
Jim. Vah. ch. V. 6.—3 Dig. 158. 293, et seq.
1 Epist. of Peter, ch. III. 19.

of the childless are supposed to be doomed; there to be tormented with hunger and thirst, for want of those oblations of food, and libations of water, at prescribed periods, which it is the pious, and indeed indispensable duty of a son *(puttra)* to offer. Of the eventual condition alluded to, a lively idea is conveyed, in the representation of the sage *Mandagola*, "desiring admission "to a region of bliss, but repulsed by the guards, who "watch the abode of progenitors, because he had no "male issue;" (1)—and it is illustrated by the special mention of heaven being attained without it, as of something extraordinary. (2) Marriage failing in this its most important object, in order that obsequies in particular might not go unperformed, and celestial bliss be thereby forfeited, as well for ancestors, as for the deceased, dying without leaving legitimate issue begotten, the old law was provident to excess; whence the different sorts of sons enumerated by different authorities, all resolving themselves, with Menu, into twelve;(3) that is, the legally begotten, and eleven subsidiary ones,—reckoning the son of the appointed daughter *(putrica putra)* (4) as the same in effect with the one legally begotten, and therefore not to be separately accounted;(5)—all formerly, in their turn and order, ca-

(1) 3 Dig. 153.

(2) Menu, ch. V. 159.

(3) Datt. Mim. sect. i. 3.—Datt. Chandr. sect. i. 3.
Menu, ch. IX. 158. 160.—Beng. Rep. 1816, p. 508.

(4) Id. p. 199.

(5) Menu, ch. IX. 158, et seq.
Note to Mit. on Inh. ch. I. sect. xi. 22.
Datt. Mim. sect. ii. 55. 58.

pable of succession, for the double purpose of obsequies, and of inheritance;(1) six, (reckoning, with Menu, the legally begotten, and the son of the appointed daughter as one,) deriving their pretensions from birth, six, from distinct adoptions;(2) the first of the twelve, namely, the issue male of the body lawfully *begotten*, being the principal one of the whole,(3) as the son *given* in *adoption* was always the preferable one, among those obtainable expressly in this mode.(4) And now, these two, the son by birth, emphatically so called, *(Aurasa,)* and *(Dattaca)* the son by adoption, meaning always the son *given*, are, generally speaking, the only subsisting ones, allowed to be capable of answering the purpose of sons;(5)—the rest, and all concerning them, being parts of ancient law, understood to have been abrogated, as the cases arose, at the beginning of the present, the *Cali* age. It is so stated in the "General Note" at the end of the translation of Menu,(6) and elsewhere repeated;(7) though it has been disputed;(8) and it is true that, in some of the northern provinces, forms of adoption, other than that of the *Dattaca*, at this day prevail.(9) It is also true that, failing a son, a

(1) Datt. Mim. sect. ii. 61, 62, and note.
(2) Menu, ch. IX. 158.
(3) Menu, ch. IX. 166.
(4) Yajnyawalcya, 3 Dig. 241.
(5) Note to 3 Dig. 276.—Post, Append. to ch. IV. p. 82.
(6) Menu, p. 363.
(7) Datt. Mim. sect. i. 64.—Datt. Chandr. sect. i. 9.—3 Dig. 271. 288.
Mohun Sing *v.* Chumun Rai; Beng. Rep. ante 1805, p. 31.
Beng. Rep. 1816. "Remarks," p. 511.
Post, Append. to ch. IV. p. 182.
(8) Id. Append. to Id. p. 119. E. contra Id. p. 177.—C.
(9) 3 Dig. 276. 289.

Hindoo's obsequies may be performed by his widow; or, in default of her, by a whole brother, or other heirs;(1) but, according to the conception belonging to the subject, not with the same benefit as by a son. That a son, therefore, of some description is, with him, in a spiritual sense, next to indispensable, is abundantly certain. As, for obtaining one in a natural way, there is an express ceremony, *(punsavana,)* that takes place at the expiration of the third month of pregnancy, marking distinctly the importance of a son born, so is the adopting of one as anxiously inculcated, where prayers and ceremonies for the desired issue have failed in their effect.(2) But, exacted as it is, wherever the want exists, in terms sufficiently peremptory, it is a *right*, and not a *duty*, to be enforced by the civil power.(3) No good Hindu lawyer, sitting in any of the King's, or Company's courts in India, would listen for a moment to an application to compel a childless Hindoo to adopt—succession to his property being at all events provided for, whether he have a son to inherit it, or not. Assuming, then, the son *given* for the purpose to be the only subsidiary one now generally recognised,(4) what is farther material to be known in the law of the subject, may be

(1) Vribaspati, 3 Dig. 458.
Vriddha Menu, 3 Dig. 478.
Datt. Mim. sect. i. 58.

(2) Dat. Mim. sect. i. 3. 5. 45.
Notes on Id. 51, 52.

(3) Post, Append. to ch. IV. p. 83.

(4) Datt. Mim. sect. i. 64.
Datt. Chandr. sect. i. 9.
Id. Synops. 211.—3 Dig. 289.
For a fuller account of the series of sons, according to the ancient law, see Post, Append. to ch. IV. p. 194.

comprehended under the four following heads:—I. The right of adoption, as well with regard to the giver, as to the receiver—the natural, as the adoptive parent. II. The person to be adopted. III. The mode and form;—with, IV. The effect of adoption. To which will be added, V. Some remarks on the practice among other nations.

I. The *right* of adoption is in one destitute of legitimate male issue, competent to the performance of his funeral ceremonies; never having had any, or having lost what he had. The right of inheriting, and that of performing for the ancestor his funeral obsequies being correlative, if, by any of the legal disabilities, as by degradation from caste, by insanity, incurable disease, or otherwise,(1) living issue have become disqualified in law for the former, the effect for the purpose in question being the same as if none existed, it is inferred that the right to adopt attaches.(2) On the other hand, adoption by one, being himself, through any of the operative causes, incapable of inheriting, seems to be of a qualified nature, not entitling the adopted to the full benefits of his condition.(3) The necessity of the thing applies, whether a man be single, married, or a widower; since to all, equally, his future state, according to his conception of it, is of the last importance. If, with the Hindoos, the

(1) Post, ch. VII. p. 152.

(2) Shamchunder *v.* Narayni Dibeh; Beng. Rep. 1807, p. 135.
Mr. Sutherland's Synops. p. 212.

(3) Datt. Chandr. sect. vi. 1, note.
Mr. Sutherland's Synops. p. 212; and note iv. to Id. p. 222.
Post, p. 98.

competency of a single man to adopt do not appear to rest upon much authority,(1) it is probably owing to the circumstance of the marriage of males, as well as of females, at a comparatively early age, being so universal, that celibacy is scarcely known among them.(2) In general, it is in default of male issue that the right is exercised;(3) *issue* here including a grandson, or great grandson.(4) But, as there exists nothing to prevent two successive adoptions, the first having failed, whether effected by a man himself, or by his widow or widows after his death, duly authorized,(5) so, even where the first subsists, a second may take place; upon the principle of many sons being desirable, that some one of them may travel to *Gaya*;—a pilgrimage, considered to be particularly efficacious, in forwarding departed spirits beyond their destined place of torture.(6)

The right of adoption, where it exists, is, as between husband and wife, absolute in the husband;(7) though adoption having taken place, the adopted becomes son to both, and, as such, is capable of performing funeral

(1) 3 Dig. 252.

(2) Mr. Sutherland's Synops. note iv. p. 222.

(3) Datt. Mim. sect. i. 6.

(4) Menu, ch. IX. 137.—Datt. Mim. sect. i. 13, 14.
Datt. Chandr. sect. i. 6.—3 Dig. 295, et seq.

(5) Narayni Dibeh *v.* Hirkishor Rai; Beng. Rep. ante 1805, p. 42.
Shamchunder *v.* Narayni Dibeh; Id. 1807, p. 135.

(6) Coureepershaud Rai *v.* Jymala; Beng. Rep. 1814. p. 460.
3 Dig. 190. 295. 297.
Asiat. Reg. vol. i. p. 286.
Bengal Rep.—cause for 1811, p. 265.
See however Append. to ch. IV. p. 85, where the doctrine in the text is questioned, by an authority on the law of adoption.

(7) Datt. Mim. sect. i. 22.—3 Dig. 244.

rites to the one, as well as to the other. A wife may adopt, but not without the assent of her husband;(1) whence it is laid down, that a widow never can adopt, as she can never have the necessary assent.(2) The objection to the *wife's* independant competency, from her inability, as a woman, to perform the requisite solemnities,(3) would apply equally to Sudras; who yet may, and do adopt.(4) The better reason, therefore, perhaps is, that the necessity of a son to celebrate the funeral rite regards the man, rather than the woman, who depends less for redemption upon such means; so that, whenever a woman, duly authorized, adopts, it is on her husband's account, and for his sake, not her own. (5) It is moreover laid down, in the case of women, that wherever the act to be done is (not of a spiritual, or solemn, but) of a secular nature, a substitute may be appointed. (6) Equally loose is the reason alleged against adoption by a *widow;* (7) since the assent of the husband may be given, to take effect (like a will) after his death; and, according to the doctrine of the Benares and Maharashtra schools, prevailing in the Peninsula, it may be supplied by that of

(1) Datt. Mim. sect. i. 15, et seq.
Post, Append. to ch IV. p. 84. S.
Janki Dibeh *v.* Suda Shes. Rai; Beng. Rep. 1807, p. 121.

(2) Datt. Mim. sect. i. 16, et seq. and 18.

(3) Datt. Mim. sect. i. 23, 24.—3 Dig. 262.

(4) Datt. Mim. sect. i. 26.—2 Dig. 109.
Post, Append. to ch. IV. p. 88.—E.

(5) Menu, ch. V. 160.
Datt. Mim. sect. i. 19. 29.
Notes v. vi. to Mr. Sutherland's Synops. p. 222, 223.
2 Dig. 463.
Post, Append. to ch. IV. p. 91.—E.

(6) 2 Dig. 61.

(7) Post, Append. to ch. IV. p. 94.—S.

his kindred, her natural guardians; [1] but it is otherwise by the law, that governs the Bengal provinces. [2] Upon the Benares principle, it has been thought that an adoption by a *mother*, under an authority given her by her (dying) son, would be good. [3] This admitted, it does not follow that it would be so, if the son left a widow; since, in that case, an adoption through the mother, would derogate from the widow's vested right. The capacity of a woman to adopt in her own right is indeed denied; though with reference to herself, and her own exclusive property; [4] while, unauthorized by her husband, or some one duly representing him, it must be foreign to *his* interests; just as, before that part of the ancient law was abrogated, she could not, without his license, have admitted his brother, he dying without leaving a son, to access for the purpose of raising up issue to him, with a view to inheritance and obsequies. [5] The authority to the widow need not be in writing, though it generally is so; as in prudence it ought to be, time and means existing. [6] In the case of the *Zemindar* of *Rajahashy*, it was in writing; of which a copy is subjoined, as an interesting document, illustrative of the

(1) Post, Append. to ch. IV. p. 92. 96. 115.—C.

(2) Rajah Shum Shere Mull v. Ranee, &c. Beng. Rep. 1816, p. 506. Post, Append. p. 96.—C.

(3) Post, Append. to ch. IV. p. 93. 96. C. 94. E.--Id. contr. S.

(4) Mit. on Inh. note to ch. I. sect. xi. 9.
Mr. Sutherland's Synops. note v. p. 222.
Sreenarrain R. v. Bhya J.; Beng. Rep. 1812, p. 344.
Post, Append. to ch. IV. p. 128.—E.

(5) Menu, ch. IX. 143, et seq.—Id. 167.

(6) Post, Append. to ch. IV. p. 96.—C.

subject. (1) In another case, cited below, a verbal one for the purpose was held good by the Sudder Dewanny Adawlut of Bengal. (2) As solicitude for his future state, and the preservation of his lineage are, with him who adopts, the motives to adoption, so present distress warrants the parents resorted to on the occasion, in giving their child to be adopted. The distress spoken of in the books has been sometimes, by a constrained construction, referred to the adopter's want of a son; (3) whereas it obviously respects the family of the child to be adopted; (4) nor is it necessary that it should proceed, as commonly supposed, from any public calamity, such as actual famine, provided it be sufficiently urgent. (5) And, though there should be no distress to justify the gift, it will be good notwithstanding; not being vitiated by the breach of a prohibition, which regards the giver only, not affecting the thing done. (6) As in adopting, so in giving in adoption, though the concurrence of parents is desirable, the husband appears, by the weight of authority, to be independant of the wife, the father of the mother. (7) Of her own mere authority, the mo-

(1) Post, Append. to ch. IV. p. 97.
(2) Shamchunder v. Narayni Dibeh; Beng. Rep. 1807. p. 135.
(3) Datt. Mim. sect. i. 7. Id. iv. 21.—Datt. Chandr. sect. i. 13. Mit. on Inh. ch. I. sect. xi. 10, and note.
(4) Post, Append. to ch. IV. p. 107.
(5) Mit. on Inh. note to ch. I. xi. 10.
Post, Append. to ch. IV. p. 107.—E.
Datt. Mim. sect. i. 8.
(6) Mit. on Inh. ch. I. xi. 10, and note.
(7) Dat. Mim. sect. iv. 13—15.—Id. sect. v. 14, and note.
3 Dig. 244. 254. 257. 261.
Vid. tam. Mit. on Inh. note to ch. I. sect. xi. 9
And note ix. (p. 224) to Mr. Sutherland's Synops.

ther cannot, in general, give her son to be adopted, any more than she can adopt, her husband living; unless he have emigrated, or entered into a religious order. (1) But his assent may be presumed: (2) and, after his death, she does not want it, a widow having this power, and a wife, also, if the distress be urgent. (3)

II. *The person to be adopted.* In a selection, for the purpose, consideration is to be had of the *class* to which the child to be adopted belongs; of his *relation*, as well to the adopter, as to his own family; of his *age;* and, lastly, to what extent his *initiatory ceremonies* have or have not, been already performed. 1. As in marriage, so in adoption, the parties must be of the same *class*, provided such a one be to be had, and not the adopter of one, and the adopted of another. (4) An adoption of one of a different class from the adopter has, in general, nothing but disqualifying effects. Parted with by his parents, it divests the child of his natural, without entitling him to the substituted claims, incident to an unexceptionable one. Incompetent to perform effectually those rites, on account of which adoption is resorted to, he cannot inherit to the adopter, but remains a charge upon him, entitled only to

(1) Datt. Mim. sect. iv. 9, et seq.
Datt. Chandr. sect. i. 31, et seq.
Note ix. p. 224, to Mr. Sutherland's Synopsis.
Mit. on Inh. note to ch. I. xi. 9.

(2) Datt. Chandr. sect. i. 32.

(3) Mit. on Inh. note to ch. I. xi. 9.

(4) Menu, ch. IX. 168. 174.
Datt. Mim. sect. ii. 22.—sect. iii.—3 Dig. 275.

maintenance.(1) 2. *Relation to the adopter.* It may be here observed, that, as no man can be compelled to adopt, so neither can any one in his own person, or any other for him, urge with effect, a right to be adopted, whatever may be his pretensions to a preference, where adoption is intended.(2) The general principle, as laid down in a recent work of great weight upon the whole of this subject, is, that *one, with whose mother the adopter could not legally have married, must not be adopted*;(3) and the exclusion seems to hold, applying the principle to the sex, where the adoption is by a female.(4) Though the adopted be not the actual son of the adopter, he is to resemble, and come as near to him as possible. He is to be at the least such, as that he might have been his son. But the adopter could not have married his own mother; it is a prohibited connexion. Consequently, his brother cannot be adopted by him.(5) The same consideration excludes the paternal and maternal uncles; the daughter's and the sister's son.(6) It must be noticed, however, that these

(1) Datt. Chandr. sect. i. 14, et seq.—Id. sect. vi. 4.
Mit. on Inh. ch. I. xi. 9. and note.
Qu. tam.—Mr. Sutherland, translator of the Treatises on Adoption, being of opinion, that the adoption being void, the natural rights remain.

(2) Post, Append. to ch. IV. p. 98. C.—104. E.

(3) Sutherland's Synopsis, p. 214.
Post, Append. to ch. IV. p. 100.—E.

(4) Note on Datt. Mim. sect. ii. 85.—Id. sect. v. 16. 20.
Datt. Chandr. sect. ii.—S.

(5) Datt. Mim. sect. ii. 30.
Note.—In 1824, a case was depending in the Sudder Dewanny Adawlut of Madras, in which an elder brother was alleged to have adopted his younger one.

(6) Dat. Mim. sect. ii. 32. and note on Id. § 102.—Id. sect. v. 18.
Post, Append. to. ch. IV. p. 100.

two latter are eligible to adoption among Sudras;(1) if not also in the three superior classes, notwithstanding positions to the contrary, no other being procurable.(2) Subject to this general principle, the nearest male relation of the adopter is the proper object of adoption. This of course is the nephew, or son of a brother of the whole blood;(3) whose pretensions were, by the old law, such, that if, among several brothers, one had a son, he was so far considered to be common to all, as to preclude in every of them the power of adoption.(4) But the injunction of Menu has, in more modern times, been construed as importing only an intention to forbid the adoption of others, where a brother's son is obtainable.(5) Where there is none, the choice should still fall upon the next nearest male relation, with liberty in default of such, to select from among distant ones: and among strangers, on failure of all kin.(6) Other authorities substitute for more distant kin, a boy, whose father and the rest of his relations reside at no great distance, and whose family and character are therefore known; being a reading of the original text, adopted by Balaam-Bhatta, a sensible expositor

(1) Datt. Mim. sect. ii. 74. 93. 95, et seq.—Id. note on § 102.
Id. v. 18.—Datt. Chandr. sect. i. 17.
Post, vol. ii. Append. to ch. IV. p. 100.—E.

(2) Post, Append. to ch. IV. p. 101.—E.

(3) Datt. Mim. sect. ii. 28, et seq.—67.—Datt. Chandr. i. 20.
Post. Append. to ch. IV. p. 102.—C.

(4) Menu, IX. 182.—Mit. on Inh. ch. I. xi. 36.
Datt. Mim. ii. 73.—3 Dig. 266.
Post, Append. to ch. IV. p. 107.—E.

(5) Datt. Chandr. sect. i. 20, 21, and note on § 22.
Qu. by Mr. Sutherland, whether the right of the brother's son be not indefeasible?

(6) Datt. Mim. sect. ii. 74.
Mit. on Inh. note to ch. I. xi. 36.

of Hindu law.(1) But the result of all the authorities upon this point is, that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one, not being precisely him who, upon spiritual considerations, ought to have been preferred.(2) But, though the adopter have this latitude, it is subject not only to the consent, but to the state also of the family, to which he eventually resorts to supply his want. For the interest, that every Hindu father has in his own obsequies, restrains the parting for adoption either with his *eldest*,(3) or with an *only*(4) son; it being of such comparative importance to him, that they should be performed by a son of his own, and, where he has more than one, by the eldest. Upon this principle, in strictness, to enable a man to give a son to be adopted, it is not sufficient that he have more than one; he should have several;(5) since if, having only two, he part with one, the death of the remaining one, leaving him destitute, would be a contingency not to be risked.(6) It does not however appear, that this ever prevailed as a rule. If therefore he have two, he may relinquish the younger; and, having but one, he may give that one, if it be to a brother; it being agreed that the exception of an

(1) Mit. on Inh. note to ch. I. xi. 23.
And see Post, Append. to ch. IV. p. 98.—E.

(2) Post, Append. to ch. IV. p. 98. C.—104. 106.—E.

(3) Mit. on Inh. ch. I. xi. 12.
Post, Append. to ch. IV. p. 105. C. & E.

(4) Mit. on Inh. ch. I. xi. 11.—Datt. Mim. sect. iv. 2, et seq.
Datt. Chandr. sect. i. 29.—3 Dig. 242.
Post, Append. to ch. IV. p. 88. 106, 107.—C.
Beng. Rep. 1816. p. 507.

(5) Datt. Mim. sect. iv. 1. 7, et seq.—Id. v. 14.
Datt. Chandr. sect. i. 30.

(6) Datt. Mim. sect. iv. 8.

only son, however operative in families more distantly related, is not binding in the instance of a nephew, whom, in a spiritual point of view, it is of such moment to obtain, where adoption is required.(1) It is true, that a brother's son, as such, inherits, and performs obsequies to his uncle, dying without preferable heirs; but then it is as his nephew, not as his son;(2) and the spiritual efficacy in the one, and in the other case, is considered to be different. To render him a substitute for a son, he must have been filiated.(3) When therefore a Hindoo has but one son, and it is agreed that his brother, having none, shall adopt him, the adopted in this case has, vested in him, accumulated rights and duties. Son by adoption to his adoptive parent, he remains so, to all intents and purposes, to his natural one; becoming *Dwyamushyayana*, or son to both;(4) which, in ordinary adoptions, is not the case, as will be shewn. The same double relation may be the result of agreement, at the time of adoption, between the adopter, and him who is willing to give his son for the purpose.(5) Thus, though a youth may in this way have two fathers, he cannot have two adoptive ones; since the same son cannot be adopted by more persons than one, excepting as between a nephew, and several uncles; nor, in this

(1) Datt. Mim. sect. ii. 37—39. 44.
Datt. Chandr. sect. i. 27, 28.

(2) Datt. Mim. sect. ii. 67.

(3) Datt. Mim. sect. ii. 53. 60, et seq.—Id. 67. 70.
Datt. Chandr. sect. i. 22.

(4) Mit. on Inh. note to ch. I. x. 1.
Datt. Chandr. sect. i. 28.—ii. 34.—iii. 17.—iv. 1.
Post, Append. to ch. IV. p. 118. E.—Id. p. 202.

(5) Mit. on Inh. ch. I. x. 13. and note on Id. xi. 9.
Datt. Mim. sect. vi. 41, et seq.
Datt. Chandr. ii. 24. 42.

case, is it clear that it can be always practicable.[1] An only son, then, thus adopted by an uncle, cannot become an absolutely adopted son to him, the filial relation to his natural parent remaining; and, to any other than a brother, he cannot be given at all. Such are, in this respect, the restrictions inculcated, but not always enforced; since, as in other instances, so with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are *directory* only;[2] and an adoption of either, however blameable in the giver, would nevertheless, to every legal purpose, be good; according to the maxim of the civil law, prevailing perhaps in no code more than in that of the Hindoos, *factum valet, quod fieri non debuit.* 3. *Age of the boy to be adopted.* The fifth year is often stated as the extreme one for adoption, referring to an authority, the authenticity of which has been disputed.[3] Whether it may not take place at any age, is a question;[4] against which the most that can be said is, that it is dependant upon that of *ceremonies,* essential to be performed for young Hindoos of the three *regenerate* (or superior) classes.[5] So long as these, not having been already performed for him in the natural family of the boy, are, with reference to his age, capable

(1) Datt. Mim. sect. i. 30. 32.—Id. ii. 43, 44.
Mr. Sutherland's Synops. p. 214.

(2) Qu. by Mr. Sutherland, as to the validity of the adoption of an only son; on the ground, according to him, that the prohibition of Vasishta (Mit. on Inh. ch. I. xi. 11.) attaches to the *adoption,* as well as to the *gift.*

(3) Calica Purana, 3 Dig. 149.
Post, Append. to ch. V. p. 221.—C.
Mit. on Inh. note to ch. I. xi. 13.
Kerut Naraen *v.* Mt. Bhobinesee; Beng. Rep. 1806. case 22. p. 82.

(4) Post, Append. to ch. IV. p. 109.—C. & E.

(5) Ante, p. 39, note.

of being performed for him, in his adoptive one, so long he is young enough, and competent in that respect to be adopted. The question varies, according as the adopted is taken from a family nearly related, or from one of strangers;(1) an adult, in the case of the latter, being generally considered as ineligible, while a preference obtains universally in favour of the tenderest age; the presumption of a happy choice, that is, of one who will be most likely to assimilate with the family, into which he is to be adopted, being conceived to be greatest in the person of an infant, whose mind remains to be cultivated, and whose character is yet in no degree formed.(2) Other nations, as will be seen, have thought differently upon this point.(3) The adopted must consent:(4) but if, as usually happens, he is an infant at the time, he is bound by the act of those by whom he is so given;(5) as the consent of a girl is effectually given for her, by those who have the disposal of her in marriage. In either case, important as the transfers are, *vestigia nulla retrorsum*.(6)

4. As to the *initiatory ceremonies*.—Not only are the Hindoos deeply impressed with the certainty of a future state, (upon a conviction and dread of which the practice of adoption is founded,) but they also consider sin to be so inherent in our nature, as to require distinct and

(1) Kerut Naraen *v.* Mt. Bhobinesee; Beng. Rep. 1806. p. 82. Post, Append. to ch. IV. p. 109.—C.

(2) Datt. Chandr. sect. ii. 23, note, and § 33.

(3) Post, p. 101.

(4) Kullean Sing *v.* Kirpa Sing; Beng. Rep. ante 1806. p. 9.

(5) Mit. on Inh. note to ch. I. xi. 9.
Note viii. p. 224, to Mr. Sutherland's Synops.
2 Dig. 106. 109.—3 Id. 262.

(6) Post, Append. to ch. IV. p. 108.—E.

specific means of expiation. Hence the institution of a series of initiatory *ceremonies*, commencing previous to conception, and producing, all together, in the three superior classes, *regeneration*.(1) It is by the performance of these, in the family and name of the adopting father, that filiation is considered to be effectually accomplished. Accordingly, the fewer of them that have been performed in the family of the adopted, previous to adoption, the better; and that adoption therefore is in this respect preferable, which takes place the soonest after the birth of the child to be adopted. With regard to two of them in particular, it is of importance that they should remain to be performed in the family of the adopter, subsequent to adoption. These are *tonsure*, or the shaving of the head, (*Chudavarana*,(2)) and (*Upanayana*) the *investiture of the cord*.(3) The affiliation of one "whose coronal locks have not been re-"duced to the form of his patriarchal tribe," is constantly inculcated.(4) The age for this operation is the second or third year after the birth; but it may be extended to the eighth,(5) which, with Bramins, is the general period for the investiture; excepting for such

(1) Note to 3 Dig. 104.
Notes to Datt. Mim. sect. iv. 23. 29.—Datt. Chandr. ii. 20. 22.
Abbé Dubois, on the Customs of India, p. 84. 100. 132.
Menu, ch. II. 27. 170. 172.—Ante, p. 39.

(2) Mit. on Inh. note to ch. I. xi. 13.
Datt. Mim. sect. iv. 22. and note to § 29.
Datt. Chandr. sect. ii. 20, et seq.
3 Dig. 148.—Abbé Dubois, p. 88. 92.

(3) Datt. Chandr. sect. ii. 23, et seq.—Id. 31, and note.
Post, Append. to ch. IV. p. 120.—E. & C.

(4) Datt. Mim. sect. iv. 34.

(5) Note to Datt. Chand. sect. ii. 20. § 23, and note to § 26.

as are destined for the priesthood,(1) upon whom it is performed at five.(2) The stipulation therefore of five, as the extreme age for adoption, may have reference to Brahmins of this description. In a case cited above, from the Bengal Reports,(3) the adoption is stated to have taken place at about eight,—*tonsure*, which precedes *investiture*, not having been performed for the adopted in his own family; and there the adoption was held good, though the age of the adopted exceeded five, the ceremonies in question (particularly the latter) remaining to be performed in the family, and name of the adopter. That they should so remain is of less consequence, in proportion as the adopted is nearly related to the adopter;(4) which seems reasonable, (if such an observation may be hazarded,) since, where a child not related by blood is to be adopted, (as may be the case where one so related is not to be had,) it may be consistent to depend for the confirmation of the tie, upon the performance of the initiatory rites in the adopting family, by means of which the adopted is considered to be in effect born again, thus becoming more essentially the son of his adopting parent;(5) a conclusion, that appears the more forcible, considering that the *Upanayana*(6) is the appointed season for the commencement of

(1) Post, p. 314.

(2) Datt. Mim. sect. iv. 53, and note.
Datt. Chandr. sect. ii. 30, and note.

(3) Ante, p. 88.

(4) Mit. on Inh. note to ch. I. xi. 13.

(5) 3 Dig. 149. 249, et seq.

(6) Note to Datt. Mim. sect. iv. 53.

his education.(1) With regard to the other two regenerated classes (the Cshatrya and Vaisya), the time for the performance of them varies;(2) while, with reference to the Sudra, the doctrine has no application; for him, as for women generally, there existing no ceremony but that of marriage.(3) Accordingly, in a case referred to in a subsequent page, the Pundits stated an assumption of the string in the higher classes, and marriage in the fourth, as obstacles to adoption.(4) But if, in the classes to which they apply, they have already been performed for the adopted in his own family, a remedy is found in the *putreshti*, or sacrifice to fire; by recourse to which they may be annulled, so as to admit of their re-performance, with effect, in the family of the adopter; who is thus enabled to perfect the act, upon which he relies for the continuance of his name, and solemnization of his obsequies.(5) Upon these principles, it would seem, as if there could be no adoption of one who is married; marriage not being capable, like tonsure and investiture, of annulment.(6) Any detailed account of these ceremonies, together with the rest that have been alluded to, in number not fewer than *ten*,(7) would be here misplaced; but, with

(1) Note to Datt. Mim. sect. iv. 53.
(2) Note to Datt. Chandr. ii. 31.
(3) Datt. Chandr. sect. ii. 29. 32.—3 Dig. 94.—Ante, p. 35.
(4) Case of Raja Nobkissen, post, p. 96.
(5) Datt. Mim. sect. iv. 40. 49, et seq.
Datt. Chandr. sect. ii. 27. 32.
Mit. on Inh. note to ch. I. xi. 13.
Mr. Sutherland's Synopsis, note ix. p. 225.
3 Dig. 149.
(6) Post, Append. to ch. IV. p. 87.—1 Bombay R. p. 196.
(7) Note to 3 Dig. 104.
Notes to Datt. Mim. sect. iv. 23.—and Id. sect. vii. 13.

reference to the *Upanayana* in particular, and the importance attached to it, it may be remarked, that, on this occasion it is, that the solemn recognition of the Supreme Being, in his triple character, as intimated by the triliteral monysyllable AUM, is taught the youthful Brahmin, with an injunction of secrecy;—speaking of which Menu says, "all rites ordained in the Veda, oblations "to fire, and solemn sacrifices pass away; but that "which passes not away is declared to be the syllable "AUM, since it is a symbol of GOD; the act of re-"peating whose Holy Name is ten times better than "the appointed sacrifice."(1) And it is, among other operative causes, to the acknowledged decline of these ceremonies, that the degeneracy of the present race, from the virtue of former ones, is attributed.(2) To the performance of them, on the occasion in question, in the family name of the adopter, peculiar importance is attached by a passage of the *Calica Purana*, purporting that, in case of their omission, in place of *filiation*, a state of *slavery* results.(3) Be this as it may, (for the

(1) Note to Datt. Mim. sect. vi. 26.—Menu, ch. II. 84, 85.
See also Preface to Translation of Menu, p. xviii. and Key to the Chronology of the Hindoos, vol. i. p. 6.—and vol. ii. p. 76, note.
Note the sacred *Tetragrammaton*, or nomen quatuor literarum of the Jews —the ineffable name of GOD; to the mysterious potency of which, they ascribed the miracles of Christ, and his disciples.—Graves on the Pentateuch, 2, 410. "That the learned Bramins are rational Theists, is certain; they secretly reject the established theory, contemning in their hearts the rites founded on it,—as the superior classes of Greece and Rome treated their innumerable superstitions, all as fables."—Paley's Evidences, p. 344.

(2) 3 Dig. 222.

(3) 3 Dig. 148, et seq.—Id. 251.—2 Id. 226, 227.
Datt. Mim. sect. iv. 22. 36. 39, 40. 46.

genuineness of the passage is doubted, if not denied,(1)) from the mystical nature of the subject, and the discordant opinions respecting it, till it shall come to be investigated and settled, with all the information belonging to the highest judicial authority, it may be unsafe to say that the condition of a boy, with reference to the ceremonies in question, might not be such, as to render him legally ineligible for effectual adoption.(2) In determining cases of this description, assistance must often unavoidably be sought by recourse to native living authorities, wherever haply such as can be implicitly relied upon for the purpose may be found;(3)—as must be done also in other instances, in administering a system, in which, as among the Hindoos, law and religion are so intimately blended;—a British court exercising ever the most delicate caution not to meddle with matters of religion, but, and in so far, as it happens to be inseparable from the question of right; upon which alone, as it concerns property, or the civil duties of life, it is its proper function to adjudicate.(4)

III. The *mode* and *form*.—Adoption is not required to be in writing, any more than an authority to the

(1) Mit. on Inh. note to ch. I. sect. xi. 13.
Mr. Sutherland's Synopsis, p. 217.—and note xi. to Id. p. 225.
Post. ch. V. p. 112. and Append. to same, p. 221.

(2) Note to Mit. on Inh. ch. I. xi. 13.
Note to Datt. Mim. sect. iv. 29.
Notes xi. and xii. (p. 225.) to Mr. Sutherland's Synopsis.
3 Dig. 249.
Mt. Bijya Dibeh *v.* Mt. Unpoorna D.; Beng. Rep. 1806. p. 84.
Post, Append. to ch. IV. p. 155.—C.

(3) See preface to Dig. p. vi.

(4) Post, Appendix to ch. VII. p. 264.—E.

widow to adopt.(1) But in a transaction so important as one transferring a young person from the family in which he was born to a new one, and, with a view to succession, interposing, by substitution, a comparative stranger, between the adopter and his existing heirs, it were best to be in writing;(2) and, at all events, the law, for the sake of certainty, encourages, if it do not stipulate for whatever is calculated to render it public and solemn. Hence, attendance of relations, with notice to the local magistrate, or ruling power of the place, is expected; but may be dispensed with.(3) The *Purohita*, or priest of the family, (who performs a correspondent office in marriage,) is the medium, through whom the boy to be adopted is solicited of those, by whom he is to be given;(4)—and, in a rite, that has for its object the future peace of the soul, it were strange if religious ceremonies were not enjoined. Accordingly, it is to be accompanied with sacrifice, oblation, and prayer. Being also a substitute for birth, it is rendered as joyous as music, and dancing, and festivity can make it. Of all this, contemplated as it is by the law, and in the ritual of the subject, the books are full;(5) nor

(1) Post, Append. to ch. IV. p. 95. 113.

(2) Bengal Rep. case II. for 1817, p. 604.

(3) Mit. on Inh. ch. I. xi. 13, and note.—Datt. Mim. sect. v. 9.
Datt. Chandr. sect. ii. 6.—3 Dig. 244.
Note xiii. p. 226, to Mr. Sutherland's Synopsis.
Gungaram Bhaduree v. Kasheekaunt R.; Beng. Rep. 1813, p. 363.
Post, Append. to ch. IV. p. 87. 113.

(4) Datt. Mim. sect. v. 11, 12.

(5) Datt. Mim. sect. v. *passim*.—Datt. Chandr. sect. ii. *passim*.
Vasishta, 3 Dig. 242. 262.—Datt. Chandr. sect. ii. 16.
Post, Append. to ch. IV. p. 218.

are any of these things omitted, where the proceeding, and matters relative to it, are *rite acta*. But, as if an affair, of such consequence to both the temporal and spiritual interests of the adopter, ought not to be left dependant in a great measure upon others, the simplicity of all that is indispensable would seem to be in proportion to its importance; if, as is laid down, the will of the parties, reciprocally expressed, and carried into execution, be what alone the law ultimately exacts, towards its validity in this respect:(1) as was with us, before the marriage act, and as continues to be pretty much at this day in Scotland, the case of marriage.—The purpose must of course have been completed, to have its effect. A mere intention to adopt may be abandoned;(2)—and even an agreement for the purpose, resting there, would not invalidate a subsequent adoption.(3) There must be *gift* and *acceptance*, manifested by some *overt* act.(4) Beyond this, legally speaking, it does not appear that any thing is absolutely necessary. For, as to notice to the Raja, and invitation to kinsmen, they are agreed not to be so, being merely intended to give greater notoriety to the thing, so as to obviate doubt regarding the right of succession.(5) And, even, with regard to the *sacrifice of fire*, important as it may be deemed, in a spiritual point of view, it is so with re-

(1) Tuum filium dedisti adoptandum mihi; is meus est factus.—
Ter. Adelph. Act. 1. Sc. 1.

(2) Post, Append. to ch. IV. p. 114.—C.

(3) Id. p. 115.

(4) Menu, ch. IX. 168.

(5) Mr. Sutherland's Synopsis, p. 218. and note xiii. p. 226
3 Dig. 244.—Post, Append. to ch. IV. p. 87.

gard to the Brahmin only;[1] according to a constant distinction, in the texts and glosses, upon matters of ritual observance, between those who keep consecrated and holy fire, and those who do not keep such fires, *i. e.* between Brahmins, and the other classes; it being by the former only that the *Datta Homam*, with holy texts from the Veda, can properly be performed;[2] as was held in the case of the Raja of Nobkissen, by the Supreme Court at Bengal, in which the then Chief Justice[3] delived an elaborate judgment, conformably with what had already been considered in a prior one, that had arisen some few years preceding, in the family of the Raja of Tanjore; wherein Sir William Jones was consulted by the then Governor-general of India,[4] upon a reference from the Madras Government.[5] The other classes, and particularly the Sudra, upon this, and other like occasions, perform an imitation of it, with texts from the Puranas.[6] And, even with regard to Brahmins, admitting their conception in favour of its *spiritual* benefit, it by no means follows that it is essential to the efficacy of the rite, for *civil* purposes; but the contrary is to be inferred;[7] and the conclusion is, that its validity, for these, consists generally in the con-

(1) Post, Append. to ch. IV. p. 88.—E.
(2) 3 Dig. 149.—Post, Append. to ch. IV. p. 83.—109.—E.
(3) Sir John Anstruther.
(4) Lord Teignmouth.
(5) Notes of Cases at Madras, vol. i. p. 75. Ed. 1827.
(6) Post, Append. to ch. IV. p. 88.—E.
(7) 3 Dig. 244. 248. 264.
Menu, ch. IX. 168.
Post, Append. to ch. IV. p. 114.—E.

sent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being either an only or the eldest son of the giver; the prescribed ceremonies not being essential. Not that an unlawful adoption is to be maintained; but that a lawful one, actually made, is not to be set aside, for any informality that may have attended its solemnization.(1)

IV. "When (says Jagannatha) (2) he who has pro-"created a son gives him to another, and the child, so "given, is born again by the rites of initiation, then his "relation to the giver ceases, and a relation to the "adopter commences."—Adoption being a substitution for a son begotten; its effect is, by transferring the adopted from his own family, to constitute him son to the adopter, with a consequent exchange of rights and duties.(3) Of these, the principal are the right of succession to the adopter on the one hand, with the correlative duty of performing for him his last obsequies, on the other. (4) The right attaches to the entire property of the adopter, real and personal;(5) and, in the form under consideration, (the *Dattaca*,) it operates lineally and col-

(1) Post, Append. to ch. IV. p. 126, 130, 178.—C.

(2) 3 Dig. 149, 150.

(3) Menu, ch. IX. 142.
Datt. Mim. sect. vi. 8.—Datt. Chandr. sect. ii. 19.
Mr. Sutherland's Synops. p. 219, and Notes.
Srinath Serma *v.* Radhakunt; Beng. Rep. ante 1805. p. 16.

(4) Dutnaraen Sing *v.* Buckshee Sing; Beng. Rep. ante 1805. p. 22.
Kullean Sing *v.* Kirpa Sing; Id. p. 10.—3 Dig. 184, 185.

(5) Kullean Sing *v.* Kirpa Sing; Beng. Rep. ante 1805. p. 10.

laterally; [1] which, in some other forms, is not the case; as appears on reference to the enumeration and distinction of sons by different authorities. [2] Admitting that one excluded from inheriting by any of the established causes of disqualification may nevertheless adopt, [3] it seems agreed that a boy so adopted, can never, by virtue of such adoption, inherit, where the claim to do so can only be made through the adopter; [4] and that he is entitled to maintenance only. [5] The right of inheriting also, in general, is subject to the existence of a son born at the time of, or subsequent to the adoption. According to Jagannatha, [6] it makes no difference, whether the son of the body be born before or after; in either case he assigns to the adopted, on the death of the adopter, a third of the property, as his share. In the latter case, participation is the rule, according to all the authorities; but, while the old law continued, distinguishing between different sets of sons, his claim was subject to the *set* to which he belonged; for, if he was of the exceptionable class, his right, in the case supposed, was to no more than a maintenance; [7] a distinction, that may be now pretty much dis-

(1) Menu, ch. IX. 158, 159.—Jim. Vah. ch. X. 8.
Mit. on Inh. ch. I. xi. 30, 31.
Mr. Sutherland's Synops. p. 219,—and note xx. p. 227.
3 Dig. 272, 273.
Shamchunder *v.* Narayni Dibeh; Beng. Rep. 1807, p. 135.
Post, Append. to ch. IV. p. 116.

(2) 3 Dig. 150, et seq.—Post, Append. to ch. IV. p. 116.

(3) Ante, p. 77.

(4) Note iv. p. 222, to Mr. Sutherland's Synopsis.

(5) Datt. Chandr. sect. vi. 1.

(6) 3 Dig. 290. 292. See however, Datt. Chandr. sect. v. 33.

(7) Datt. Mim. sect. iii.—Datt. Chandr. sect. v. 19. vi. 4.
Jim. Vah. ch. X. 7. 9. 13.—Mit. on Inh. ch. I. xi. 26.
3 Dig. 175.—Catyayana, Id. 179.

regarded, every description of subsidiary son being, in the present age, generally speaking, reduced to the *son given.* Whether, however, the share, with regard to him, be a third, or a fourth only, is, among conflicting opinions, and various readings, left uncertain, (1) subject to the adjustment of the difference by reference to the personal qualities of the claimant; a criterion of title, not unfrequently advanced in the Hindu law; to be ascertained, however, with more ease and certainty by the members of a family, than in a court of jnstice.(2) Among the Sudras, in the same event, the after born son and the adopted share equally the parental estate. Neither is the change that takes place on adoption in the relation of the adopted, in all cases, absolute. If, in consequence of a special agreement for the purpose between the two families, or otherwise, the adopted, in becoming the son of another, does not cease to belong, as before, to his natural parents, he will perform obsequies, and succeed to both,—to his natural, as well as to his adopting ones; as he will also do, failing male issue on the part of his natural father, whether from the adopted, who was parted with, having been his only son, or from the subsequent death of such as re-

(1) Catyayana, Datt. Chandr. sect. v. 16.—3 Dig. 179.
Devala, 3 Dig. 154.—Jim. Vah. ch. X. 7. 13.
Vasishta, Datt. Mim. sect. v. 40.—x. 1.
Datt. Chandr. sect. v. 17. 19.—Mit. on Inh. ch. I. xi. 24. 26.
Note xxii. (p. 228.) to Mr. Sutherland's Synopsis.
Daya Cr. Sangraha, ch. VII. 23, et seq.
According to the practice in the south of India, where there exists legitimate issue after-born, the share of the adopted is said to be a fourth.

(2) Datt. Chandr. sect. v. 20. 22.
3 Dig. 181, 182. 238. 249. 273. 276. 286.—Post, p. 141, 193.

mained.(1) In any of these cases, the adopted becomes son of two fathers, or, as he is called, *Dwyamushyayana*;(2)—a term diverted from its original meaning, to signify any adopted son, retaining, with his acquired relation to his adopting father, his connexion with his natural one;(3) in which case, he cannot marry in either family; as, in the ordinary one, he cannot marry among his adoptive, but may one of his natural relations,(4) if not related within the prohibited degrees of kin. According as this double filial connexion is consequential, or the result of agreement, the adopted is *nitya*, or *a-nitya*, a complete, or incomplete *Dwyamushyayana*;(5) though, by some,(6) this distinction is made to depend upon the adoption taking place before, or after the performance of tonsure, in the family of the adopted; the effect, in the latter case, where the adopted is from a different tribe, (*gotra*,) being, that the adoption, so far from being permanent from generation to generation, continues during the life of the adopted only; his son, if he have one, returning to the natural family of his father. In the case of simple, absolute adoption, every right and obligation being varied, the adopted,

(1) Doubted by Mr. Sutherland, referring to the opinion of Subhadini, commenting on § 32. ch. I. of Mit. on Inh., where he says only in this case, "the qualification of the adopted son, *to perform exequial rites*, should remain," but no more.—Mit. on Inh. ch. I. sect. xi. 32, note.

(2) Post, Append. to ch. IV. p. 118, 202.

(3) Mit. on Inh. ch. I. x. 1, and note.—Ante, p. 86.

(4) Datt. Mim. sect. vi. 47.
Datt. Chandr. sect. ii. 40.—Id. sect. iv. 7.—Qu. tamen; et vid. Mr. Sutherland's Synopsis, p. 219.

(5) Mr. Sutherland's Synopsis, p. 220.

(6) Post, Append. to ch. IV. p. 120, et seq.

succeeding to the rights of a begotten son, ceases to be liable for the debts of his natural father, so far as such an obligation attaches, independant of assets.(1) By the laws of Solon, which introduced adoption into Greece, the adopted, by begetting a son, and leaving him in his place, might relinquish the adoptive, and resume his station in his own family. But a Hindu adoption is permanent, unless in the instance that has been alluded to of an *a-nitya Dwyamushyayana;* nor can the adopted be deprived of its advantages for any cause, or upon any pretence, that would not forfeit to a son begotten his natural right to inherit.(2) Should it have devolved upon a widow to adopt, her husband's estate descending to her on his death, adoption subsequent divests her succession, like the case of a posthumous child.(3) On the other hand, and upon the same principle of the adopted representing throughout the legally begotten son, upon his death unmarried, and without issue, having survived his adopting father, the widow of the latter, if living, would succeed as legal mother to the adopted. The property in him by adoption would not go to his natural relations, his connexion with whom, as it regards inheritance, being by that means extinct.(4)

Such are the principal points, with the rules and

(1) Post, Append. to ch. IV. p. 124, 125. C.—Note to 1 Dig. 266.

(2) Post, Append. to ch. IV. p. 107. and p. 126. E. and 12.—C.

(3) Post, Append. to ch. IV. p. 127. C.

(4) Datt. Mim. sect. vi. 8, et seq.
Mt. Bijya Dibeh v. Mt. Unpoorna Dibeh; Beng. Rep. 1806, p. 84.
Post, Append. to ch. IV. p. 129.—C.

reasoning upon them, in the law of adoption. A few of them were discussed, in a case that was before the court of the Recorder of Madras some years ago,(1) but from comparatively imperfect materials. The public were not then possessed of the extensive information on the subject, contained in Mr. Colebrooke's translations on the law of Inheritance;(2) nor of the treatises on Adoption since translated by his nephew, Mr. Sutherland;(3)—to say nothing of the MSS. materials, that came subsequently to the hands of the author; and which have contributed so largely to every chapter of this work.

In the court which replaced that of the Recorder, (the Supreme Court of the same settlement,) a question arose in 1812, as to the competency, at the present day, of adoption by *purchase;* constituting the *Crita,* or eighth subsidiary, according to Menu's enumeration;—considered by all the northern authorities to be forbidden in the present age, though allowed by the ancient law, and said to be in use still in Southern India; but of which no evidence was offered on the trial, sufficient to establish it on the ground of usage;(4) while the highest authorities to the Southward, as well as in other parts of India, seemed to have long restricted adoption in general to that which takes place by *gift.* The question was not determined, the action having been compromised; but it gave rise to a discussion too closely

(1) Veerapermall Pillay *v.* Narrain Pillay; Notes of Cases at Madras, vol. i. p. 78. Ed. 1827.

(2) The Daya Bhaga of Jimuta Vahana, and the Mitacshara.

(3) The Dattaca Mimansa, and Dattaca Chandrica.

(4) Post, Append. to ch. IV. p. 111.

connected with the subject of these pages, and much too instructive, not to be added to them. It will accordingly be found in the Appendix.(1) Of the various other modes, now also more or less obsolete, a separate account is inserted in the Appendix, sufficiently minute (it is hoped) to answer the purposes for which it professes to be subjoined;(2) namely, those of illustration, and curiosity.

V. As to the practice among other nations, instances occur among the Mahomedans in India, but they are of a spurious kind, resulting from their intermixture with the Hindoos, not warranted by the Koran. The term, as used in the New Testament, (υιοθεσια,) is applied *spiritually*, adoption not forming a part of the law among the Jews, though it existed, in a certain degree, with the Hebrews; and may have been more or less prevalent throughout the East.(3)

Among the Athenians, any citizen could adopt, not having at the time a legitimate son. An after-born son, and a previously adopted one, became co-heirs. Distress led the natural parent to part with his child, who, by the transfer, ceased to belong to his own family, except as to rights derived from or through his mother, with whom his relation continued in full force.

(1) Id. p. 126 to 193.; and see Gooroovummal and another *v.* Mooncasamy; Notes of Cases at Madras, vol. i. p. 61. Ed. 1827.

(2) Post, Append. to ch. IV. p. 194 to 217.
On the subject of adoption generally, see the opinion of nine Sastrus, in 2 Bombay R. p. 92.

(3) Gen. ch. XV. v. 3, and note in Mant's ed. Ep. to the Romans, ch. VIII. v. 17, sed qu.

On the other hand, adopted into a new one, he could not himself adopt; *delegatus, non potuit delegare:* neither could he devise away what he had acquired by adoption. Though irremovable by the adopter, unless for weighty reasons to be allowed by the law, the adopted could always quit the family into which he had been received, and return to his own, upon leaving behind him in the former a legitimate son. Adoption prevailed among, but was not restricted to relations; for the Athenians, in indigent circumstances, were in the practice, for money, of adopting wealthy foreigners, who, on their part, courted adoption, as it made them citizens;—and, though the selection of a child of tender age was competent, it was an argument for preferring an adult, that his qualities might be known. Adoption among them was apt to be deferred; and the appointment of an heir by will, in default of issue, amounted to one. It is remarkable that the ceremony was attested, as among the Hindoos, by the presence of relations, friends, and neighbours; and that the custom itself had for its object, as with them, not only the preservation of families, (against the extinction of which the Archon was by public and common law commanded, if necessary, to provide,) but *the due celebration, also of the funeral rites of the adopter, and his ancestors*;—the design of the appointment by the last occupier of an estate, being expressed to be, to have a son, "who "might perform holy rites at his tomb, preserve his "race, and, by transmitting his name to a perpetual "chain of successors, confer on him a kind of immor-

"tality."(1)—This appears every where in the speeches of Isæus; from which principally, as translated by Sir William Jones, the above summary has been extracted.

From Greece, the practice found its way, through the Decemvirs, to Rome: the end and conditions of it there are explained by Cicero, in his speech for the restitution of his Palatine House, in which he has occasion to arraign, and question the adoption of Clodius, by shewing, in opposition to it, in all its particulars, (to transcribe the account given by Middleton,(2)) "that "the sole end of adoption, which the law acknow-"ledged, was to supply the want of children, by bor-"rowing them, as it were, from other families;—that it "was an essential requisite of it, that he who adopted "should have no children of his own, nor be in con-"dition to have any;—that the parties concerned should "be obliged to appear before the priests, in order to "signify their consent, the cause of the adoption, the "circumstances of the families interested in it, and the "nature of their religious rites; so that the priests might "judge of the whole, and see that there was no fraud nor "deceit in it, nor any dishonour to any family or person "concerned."

To recur to its prevalence in Greece;—the introduction of it into Athens, with the rest of his laws, replacing those of Draco, is attributed to Solon; who, in the early part of his life, being engaged in commerce, travelled, not only upon that account, but for instruction

(1) Commentary on Isæus, p. 193.

(2) Life of Cicero, sect. vi. vol. i. p. 358. 8vo. edit. 1819.

also in the laws and usages of other nations. Where then, it may be asked, did he learn the practice of adoption? In other words, can it be doubted but that it was imported by him, mediately or immediately, from India? Of his travels, too little is known, not to admit the possibility of their having extended so far. That he was in Crete, and Egypt, is recorded; and, if Sir William Jones's conjecture be maintainable, that *Minos* and *Menu* were the same person,(1) the problem is solved, and the conclusion inevitable. That the correspondence of the institution in all its main particulars, as it prevailed in the three countries of India, Greece, and Italy, was the result of communication, and not a coincidence, is inferable, considering that adoption, like inheritance, is an affair *positivi juris*, instead of depending upon those fundamental and universal principles, which, animating the breasts, and influencing the conduct of mankind in general, produce, in various subjects of familiar intercourse, an identity of rule; flowing, not from convention, but from the nature of things, from our common ideas of right and wrong, from (if it may be so said) our almost innate propensities and conceptions.

With us, the practice can be traced, if at all, only in the condition, not unfrequently imposed by wills on devisees, to take the name of the testator; which, as already intimated, according to the law as it was understood in Athens, constituted a virtual adoption.

(1) Preface to his translation of Menu, p. ix.
By the author of a "Key to the Chronology of the Hindoos," a work written with the very best intentions, he is identified with the prophet *Enoch*.

CHAP. V.

ON SLAVERY.

HAVING noticed Slaves, as entering into the composition of a Hindu family,[1] the subject finds its place here, following that of Sons. That it belongs to this work, results from their being classed by the Hindu law with *land;* capable of being transmitted by Inheritance, or transferred by Contract. In this view, it is proposed to investigate in the present chapter, First, the origin of slavery among the Hindoos; Secondly, how far it is defeasible; Thirdly, the dominion of the master, or owner, while it continues, over the property and person of his slave.

1. To begin with its origin. It belongs not to this work to reprobate, as it deserves, the existence of slavery, by exposing and expatiating upon its horrors, necessary, or natural; the topic having been rendered trite, through the exertions of those, who have, in our own country and day, by their Christian eloquence, effected so much toward the extinction of the iniquitous *traffic*, and (it is to be hoped also) *property* in them. And were the task to be here attempted, it were vain with reference to India, unless the legislature could, with prudence, as well as

(1) Ante, p. 68.

propriety, interpose, to do away entirely, within the limits of its sovereignty, so great an abuse. Down to 1816, no case had arisen at Madras, to try the question; and, though, what was said so long ago as the time of our Elizabeth, is, in a legal sense, as referable to ourselves, happily true, namely, "that the air of England is too pure for a "slave to breathe in," it is not so, in a political sense, with regard to India; the latter having been in all time, and essentially, a despotic country. Accordingly, that slavery obtains in it was, with all his dislike of the thing, and, however reluctantly, admitted by Sir William Jones, in one of his beautiful charges to the Grand Jury of Calcutta, (already alluded to,)(1) commenting on the case of the death of a slave girl, beaten by her master; in his discourse upon which, it is perhaps to be wished, that an exalted zeal for the rights and happiness of his species, may not have led him to present too favourable a view of the condition, as it exists among the Hindoos, *in point of law;*—too high wrought a picture of it, in point of misery, as represented by him, with reference to that town in *practice.* As contrasted with Sir William Jones's, the following succinct description, by Mr. Colebrooke, specifies, with accuracy, its origin, at the same time that it establishes its existence. "Slavery (says that learned "jurist(2)) is fully recognized in the Hindu law; and the "various modes by which a person becomes a slave, are "enumerated in passages which will be found quoted in

(1) Delivered June 10, 1785. See his Works.

(2) Post, Append. to ch. V. p. 221.

"Jagannatha's Digest,(1) comprehending capture in war, "voluntary submission to it for divers causes; involun-"tary, as in payment of debt, or by way of punishment; "birth, or offspring of a female slave; and gift, sale, or "other transfer by a former owner." The authorities alluded to for the several sorts, according to their origin, are Menu and Nareda, of whom the former enumerates seven, the latter fifteen; the latter enumeration, however extended, with reference principally to the occasions of emancipation, being considered to be in effect, included in the former.(2) Referring to the latter, as being the most detailed, six out of the fifteen are by transfer, or derivative, which suppose pre-existing titles. Such are, the slave born of a female one in the house of her master, which supposes the slavery of the mother; the slave bought, received in donation, inherited, pledged by his owner, or won from another at play. Admitting slaves to be property, as much as cattle,(3) (a necessary concession, constituting the great objection to the existence of slavery,) that *partus sequitur ventrem*,(4) and that they descend, and may be transferred, (whatever may be thought of the unfeeling levity of making them a stake at play,) cannot be denied. Such, in general, is their state in our Western colonies, secured to purchasers and proprietors, by British acts of parliament; a condition of things, which, in the progress of events, seems likely to

(1) 2 Dig. 224. 228.
Daya Crama Sangraha, ch. XII. sect. i. 3, et seq.

(2) 2 Dig. 230.

(3) Yajnyawalcya, 1 Dig. 113.—Sulapani, Id. 114.
Catyayana, Id. 151.

(4) Datt. Mim. ch. IV. 75, et seq.

cure itself; extreme evil, by means however deplorable, often generating its own remedy. The question remains, as to the original title, how this is created?—According to Justinian, by two means only; viz. *jure gentium*, by captivity in war, and, *jure civili*, by contract;—titles that have been satisfactorily shewn to be untenable upon principle;(1) but this to little purpose, where the inquiry is, as to a fact of positive law. With regard to slavery, as arising from captivity in war, deep-rooted in the practice of ancient nations, the texts of Menu and Nareda concurring, the Hindu Digest records the speech of one barbarian king to another, who had been recently vanquished by him, exemplifying, in a striking manner, the commutation of death for servitude. "Fool, "(says the conqueror to his captive), if thou desirest "life, hear from me the conditions: thou must declare "before a select assembly, and in the presence of the "multitude, 'I am thy slave.' On these terms I will "grant thee life."(2) If, under the Roman law, the title was only where one *sold* himself to another, according to the Hindu law, he who *sells* may *give;* nor is the sale or gift to be necessarily the act of him who is the object of the transfer, a right of transfer following the right of property.(3) Gift, and contract, therefore, by others as well as by the individual, are established titles, in daily use, particularly during famine, to which India is subject; and of slaves so transferred, persons, varying with

(1) Blackst. Comm. vol. i. p. 423, 12th edit.
(2) 2 Dig. 228.—Menu, ch. VII. 91.
(3) Post, Append. to ch. V. p. 224.

the sex, are appointed for the examination.(1) In the Appendix, judicial instances are given of the practice at Broach, one of the Zilla stations, under the presidency of Bombay.(2)—It had the sanction of Sir William Jones in his own person, as he tells his audience in his charge at Calcutta; where, according to the same authority, the sale of slaves was, in his time, as extensive and notorious, as that of any other commodity. And, though that eminent person professed to look upon those, which he possessed, in the same light with other *servants*, adding, that, whenever they should be old enough to comprehend the difference of the terms, he should certainly tell them so, whereby he vindicated the humanity of his amiable character; the point is, whether, upon a return to a *Habeas Corpus*, stating either a purchase or a gift, according to the usage of the country, and consonantly with the authority of Menu and Nareda, he would have taken upon himself to have *released.*(3)—Where the slavery is for a limited time, as in pledge for the payment of a debt, or in consideration of maintenance, (being two of the instances enumerated by Nareda,) the stipulation, creating it, is rather in the nature of a contract for service, as contradistinguished from slavery; which may be so just, that those bound by it seem to be improperly called slaves;(4) the only badge of their slavery being, the obligation they may be under, of performing servile work. That children

(1) Yajnyawalcya, 2 Dig. 310.—Nareda, Id. 315.
(2) Post, Append. to ch. V. p. 224 to 228.
(3) Vide Ante, p. 66.
(4) Nareda, 2 Dig. 222.

than in the times of distress, may readily be believed. Of this description was stated to have been a large proportion of the boat loads, referred to by Sir William Jones, as coming continually down the Ganges, for sale at Calcutta; but that titles, so originating, could not stand for an instant exposure in a court of justice, need scarcely be added; abhorrent as the Hindu law is, (equally with any other whatever,) of force and fraud.(1) To this place is referable the instance already alluded to under another head,(2) of adoption by *purchase*, where, adoption failing, whether from defect of the prescribed ceremonies, or other cause, a condition, not in contemplation of the parties, ensues. The child selected, not being able to return to his own family, his connexion with which is extinguished, and equally incapable of belonging, in the intended capacity of a son, to the one to which he has been so transferred, supposing the adoption not to be legal, he is said to become the *slave* of the adopter.(3) Such is the reasoning; and, admitting the conclusion, which, however, is disputed,(4) the rank of children, so becoming slaves, through failure in the requisites of adoption, has been assigned in the most favourable class, that of slaves maintained in consideration of service, who are entitled to their immediate release, on are frequently stolen for the purpose of being sold, other

(1) Nareda, 2 Dig. 239.—Menu, ch. VIII. 165. 168.
Post, Append. to ch. V. p. 226.

(2) Ante, ch. IV. p. 102.—Append. to ch. V. p. 221.

(3) 3 Dig. 148, et seq. 226, 227, 251.
Datt. Mim. sect. iv. 22. 36. 39, 40. 46.
Post, Append. to ch. V. p. 221.

(4) Mit. on Inh. note to ch. I. sect. xi. 13.
Mr. Sutherland's Synopsis, p. 217, and note xi. to Id. p. 225.

relinquishing the maintenance. [1] This is an instance in which slavery, if it legally ensues, may be said to *result;* but the same consequence does not follow, where the failure proceeds from the birth of a son, to the adopting father, subsequent to the adoption, as has already appeared. [2] Another special one is, where a man cohabits with, and much more where he marries the slave girl of another, whereby he becomes the slave of her owner; or, in the language of the law, "a slave for the sake "of his bride." [3] The converse of which holds; since, if a free woman. marry a slave, she becomes the property of her husband's master. But the female slave of one, marrying the male slave of another, remains the slave of her owner,—marriage not altering the property in her, unless consented to by her master; in which case it operates as a transfer of her, as slave, to her husband's master. [4] Slavery for this cause is considered as ranging under the head of *gift*, the party, in either case, acquiescing in the consequence. [5] It will be seen, in a subsequent chapter, [6] that, upon a man's becoming a religious devotee, thus abdicating secular concerns, his property is divisible among his sons, by a sort of anticipated inheritance, as though he were dead; which he is, in effect, in law. Upon the assumption of such an

(1) Post, Append. p. 223.—C. Qu. tamen; et vid. 2 Dig. 231.
(2) Ante, p. 98.
(3) Nareda, 2 Dig. 225.—Vrihaspati, Id. 228.
Catyayana, Id. 254.
(4) Catyayana, with the Commentary, 2 Dig. 252.
Daya Crama Sangraha, ch. XII. 7, et seq.
(5) 2 Dig. 250.
(6) Post, ch. IX. p. 185.

order, respect may be entertained for the act, where it is seen to be sincere. For *apostacy* from it, the Hindu law makes no allowance; it operates as an exclusion from inheritance,(1) and, with reference to two of the superior classes, viz. the Cshatrya, and Vaisya, as a cause of servitude,—apostates, in either of these two classes, becoming, by their apostacy, slaves to any master, as may happen by agreement; and eventually to the king, as some atonement for their offence;(2) with this peculiarity, that they may be slaves in the inverse order of the classes, that is, to masters of a class inferior to their own; contrary to the general rule, which is against such a degradation in slavery, as it has been seen to be in marriage. (3) Hence it appears, that slavery is not confined to the class of the Sudra. The Brahmin, that highly privileged order, is indeed exempt from it; who therefore, if he apostatize, is to be banished; (4) being (says Dacsha) first caused by the King to be *lacerated by the feet of dogs.* (5) Were a Brahmin even willingly to become a slave, though, with regard to the individual, *volenti non fit injuria*, yet, upon general principles, it would be the duty of the state, feeling the indignity, to interpose to prevent him. (6) But, neither can he be re-

(1) Post, ch. VII. p. 164.

(2) Nareda, 2 Dig. 224.—Catyayana, Id. 227. 229.

(3) Nareda, 2 Dig. 253.—Catyayana, Id. 254.—Ante, ch. II. p. 38.

(4) Catyayana, 2 Dig. 227.

(5) 2 Dig. 227.—According to the Vaysahara Myookha, the offender is to have his forehead branded with a heated plate of iron, having the foot of a dog engraved upon it.

(6) 2 Dig. 255.

gularly employed in the performance of servile acts, or impure work, incompatible with the dignity of his order;(1) which, however, it seems, is not compromised by sweeping a temple, or accepting alms; and, with reference to which, he is even exhorted "to make no provision for the mor- "row." (2) The remaining cause of slavery to be noticed, is that of the non-payment of a fine, for which (according to the commentary of Menu (3)) the party is liable to loss of liberty, till it be acquitted, upon the common principle of *qui non luit in crumenâ, luat in corpore;* though extended in its operation, beyond what we are accustomed to. Here again the Brahmin has his privilege; the other orders, when unable to pay a fine, being doomed to discharge it by their labour; but "a priest (says Menu) "shall discharge it by little and little." (4) Of the various causes of slavery among the Hindoos, thus enumerated, originating in captivity, in gift, in contract, or in punishment, the one considered to be the vilest, is where one *sells himself*, (5) the sole ground, (captivity excepted,) according to the civil law; but the Hindu law makes a reserve, where such sale is for a religious purpose; of which an instance is recorded of *Herischandra*, a celebrated monarch, who, having already divested himself of his entire property, in favour of the holy sage *Visvamitra*, became

(1) Menu, ch. IV. 15.—ch. VIII. 102.

(2) Menu, ch. IV. 3, et seq.—Catyayana, 2 Dig. 255.
Vishnu, 2 Dig. 257. See as to this order however, Post, p. 310.

(3) Menu, ch. VIII. 415.—2 Dig. 229.

(4) Menu, ch. IX. 229.—2 Dig. 229.—1 Id. 349.

(5) Nareda, 2 Dig. 251.

the slave of a *Chandala*, (one of the very lowest tribes,) for the payment of a sacrificial fee.(1)

2. As to its defeasibleness.—Of the slave born, of those acquired by purchase, by gift, or by inheritance, the servitude is permanent and hereditary, releasable by emancipation, or death only, the latter not being by the act of the slave; for, where it is, the suicide, according to the religious notions of the natives, remains the slave of the same master in another birth; (2) a fancy, that may serve to illustrate his hopeless condition in this life, from which, as it appears, he can by no means of his own escape. To this, however, there is an exception, where the life of the master, being in imminent peril, is saved by his slave; but with this qualification, that, to render such service a title to release, the exertion for the purpose must have been at the risk of the slave's own; for otherwise, it would be but in course, that he should do every thing in his power to save his master's, being in danger.(3) Another exception is, where the owner, cohabiting with his slave girl, she bears him a son, he not having at the time any other, legitimate or adopted; in which case, she and her issue are enfranchised :(4)—and a humane provision denies to him, except in distress, the right to dispose of his female slave to another, she resisting the sale; unless she have forfeited the benefit of it by her viciousness.(5)

(1) 2 Dig. 232.
(2) 2 Dig. 232.—Post. p. 155.
(3) Nareda, 2 Dig. 241.—Yajnyawalcya, Id. 245.
(4) Catyayana, 2 Dig. 247.
Vid. tam. Datt. Mim. sect. iv. 75, et seq.
(5) Catyayana, 2 Dig. 258, 259.

It is to be observed, however, that, in support of these propositions, the Southern Pundits, who have been consulted upon them, have no other authorities to refer to, than those furnished by Jagannatha, which are principally applicable to the Bengal provinces; independant of which, it may be a question, whether, in the case of purchase, gift, or inheritance, the permanency of the slavery so created, may not depend on the original condition of the particular slave, as having been one beyond redemption, or not: so as to resolve itself into the proposition, that the slave by birth is the only irredeemable one. Of the rest, the slavery is, by various means, defeasible, independant of the will of the owner; the captive taken in war, the slave won at play, and the one *self*-given, being redeemable, on finding a substitute.(1) With regard to the slave for a stipulated time, he ceases to be so, on the term of his servitude expiring;(2) and he, whom love has enchained in a double captivity, becomes free again by discontinuing his commerce, and withdrawing from the object of his passion.(3) For the remaining ones, whose bonds are not permanent, they may recover their freedom by payment, where their servitude is for a debt, or fine; by compensation, where it has been for maintenance.(4) For, though the gains of a slave, while he continues so, vest in his owner; yet, if he be incapable by other means of property applicable to his redemption, he may at all

(1) Nareda, 2 Dig. 246.—Daya Crama Sangraha, ch. XII. sect. ii.
(2) Nareda, 2 Dig. 245.—Id. p. 239.
(3) Nareda, 2 Dig. 247.
(4) Yajnyawalcya, 2 Dig. 245.—Nareda, 2 Dig. 243. 245.
Append. to ch. V. p. 225 to 228.—C.

events be redeemed by the aid of friends.(1) The slave pledged for debt remains the property of his original owner, redeemable till the time for payment be passed, when the property is altered, becoming vested in the mortgagee, in the nature of a slave bought; and, as such, irredeemable, if the title pledged was an absolute one.(2) While the servitude continues, a slave quitting his owner may be reclaimed;(3) and a text of Menu, confined indeed to the Sudra, is considered as warranting the position, that a slave, emancipated by his master, received by another, and emancipated by him, may be re-seized by his former owner; but this would be contrary to principle; and the fairer construction of it is the obvious one, that his emancipation leaves him still a Sudra, liable of course to all the duties of his class, being essentially servile.(4) The form of manumission is, by the master taking a pot of water from his shoulder, and breaking it with appropriate ceremonies; upon which the slave becomes free.(5)

3. As to the dominion of the master; first, over the *property* of the slave; it is certain that the latter can acquire only for the benefit of his master; possessing his person, he possesses every thing that can relate to it; nor can the slave have any property, that he can call his own, but by his master's consent.(6) Secondly, with regard to his *person;* that the owner has the same

(1) Catyayana, 2 Dig. 252.—Colebr. on Obligations, p. 232

(2) Nareda, 2 Dig. 245. Post, Append. to ch. V. p. 226.—C.

(3) Nareda, 2 Dig. 237. Post, Append. to ch. V. p. 229.—C.

(4) Menu, VIII. 413, 414.—2 Dig. 232. 238.

(5) Nareda, 2 Dig. 248.

(6) Menu, VIII. 416, 417.—Nareda, 2 Dig. 237. 249.
1 Dig. 16.—Catyayana, 2 Id. 252.

power of correcting his slave, that belongs to a master over his servant, is implied, for he is one of the most abject kind; and a runaway slave is reclaimable.(1) But, if a slave pledged refuse to work, complaint should be made to his owner, who must assign the pledgee another; such slave, while in the possession of the latter, not being liable to be beaten by him.(2) That the master has power over his slave's life, no where appears; and here, construing "servant," in the text cited from Menu, to comprehend *slave*, that great legislator and Sir William Jones are agreed that, in the exercise of such power over him, as by law he has, it is at his peril, if it be immoderate, according to the consequences that may ensue.(3) But, with the exception stated, it is competent to him to compel him by force, not being excessive, to do whatever work he orders him to perform; in which consists mainly the difference between a slave and a servant.(4)

(1) Nareda, 2 Dig. 237.—Ante, p. 116.
(2) Catyayana, 1 Dig. 153, and Comment.
(3) Menu, 2 Dig. 209.—Sir W. Jones's Charge, June 10, 1785.
(4) Nareda, 2 Dig. 222.—Vribaspati, Id. 223.

CHAP. VI.

OF INHERITANCE.

HAVING, in the preceding chapters, discussed, at a length sufficiently proportioned (it is hoped) to their importance, a variety of subjects, all, in the primary view of them, distinct from those of *Inheritance* and *Contract*, it becomes time now to enter upon the former of these two; in doing which, it is to be remembered that the Hindoos are a patriarchal people, many families often living together as one; connected in blood, and united in interests; with various relative dependants, to be provided for out of the aggregate fund; but subject always to separation, as well as to the exclusion of any one or more, from participation in the inheritance, for causes to be hereafter enumerated.

The inheritance having descended, such union of interests, among families living together, and carrying on their transactions in common, constitutes *coparcenary*, to which survivorship attaches, differing in this particular from coparcenary with us, and resembling rather jointenancy; so that, on the death of a Hindu parcener, the succession to his rights, with exception of property separately acquired by him, vests in the other remaining members,—his sons, if he leave any, representing him as to his undivided rights, while the females of his family continue to depend on the aggregate fund, till a *partition* takes place, which may never happen. But,

according to the law, as it prevails in Bengal, where an undivided coparcener dies, leaving a childless widow; his share does not vest in the surviving parceners, but descends to his widow, as his heir;(1) whereas, the Mitacshara restricts her right of inheriting to the case of her husband so dying separated; allowing her, where he dies undivided, a maintenance only.(2) In every other case, universally, survivorship takes place, the remaining coparceners continuing to administer and enjoy the undivided property, as will appear in the chapter on Partition. In the present, the VIth, will be detailed succession to property by *Inheritance;* to be followed, in the VIIth, with an account of the *disabilities* that exclude from; in the VIIIth, of the *charges*, to which it is liable: and, in the IXth, of the whole subject of *partition;*—reserving for the Xth, *Succession to a widow*, with other matters connected with the state of *widowhood.* These five chapters may be considered as exhibiting, in its fullest extent, though by way of outline only, the Hindu law of *Inheritance.* To these will be subjoined, for reasons to be assigned, a chapter (the XIth) on the *Testamentary* power; engrafted, as it has been by the King's Courts, on the native law of Succession, notwithstanding the fact conceded, *that a Will is a mode of disposing of property, unknown to the*

(1) Jim. Vah. ch. XI. sect. i. 7. 14. 46, and notes.
Beng. Rep. ante 1805. p. 30. 48. 63. 91.

(2) Mit. on Inh. ch. II. sect. i. 20, note.—Id. 31, note.
Beng. Rep. ante 1805. p. 16. 29. 66.
1 Bombay Rep. p. 241.
But see, upon this point, Append. to ch. VIII. p. 297.—E.

Hindu law.(1) After which, it will remain only to discuss in a concluding one, (the XIIth,) the law of *Contracts;* being the second of the two great subjects, specially reserved by the Royal Charters, to be adjudicated upon by their own law, in all cases of the kind, arising in the King's Courts, between native and native.

To begin with the subject of the present chapter. So intimate by the Hindu law is the connexion between the two subjects of *partition* in the life of the father, and *inheritance* upon his death, that they may be said almost to blend; since, not only upon his demise, but upon his renunciation of worldly concerns, with a view to the ending his days in devotion,(2) or, after such an absence from his family as may justify the inference that, if not in fact dead,(3) he has abdicated his temporal rights, the latter, *i. e.* inheritance, in effect, by anticipation, as it were, attaches; as it does on his degradation for crime, unexpiated:(4)—the material difference between them, as concerns the objects, being, that, on *partition* by the father, he has a discretion with regard to property of his acquirement, in contradistinction to what had descended, to divide it among his sons in such shares as they may respectively merit, or as circumstances may dictate, exercising it always, not arbitrarily, or capriciously; whereas, what-

(1) Note to 2 Dig. 516.
(2) Post, p. 186.
(3) Post, p. 188.
(4) Post, p. 184.

ever be the nature of that of which he dies possessed, he has, according to the doctrine of the Mitacshara, no power to regulate the *succession*, which the law, upon his death, vests equally in all.

Sons.—In the series, then, of a Hindoo's heirs, the first, in order, is his male issue, legitimately *born*; or, in its default, its substitute, and equivalent, a legally *adopted* son; what constitutes for this purpose one legally born, or legally adopted, having already been shewn, under the respective heads of Marriage(1) and Adoption.(2) By the ancient law, indeed, legitimacy, as well with reference to birth, as to filiation, had comparatively a very wide meaning. To what extent, in a stricter, or looser sense, it included sons *substituted*, may be seen in the Appendix to a former chapter;(3) and, with regard to *issue*, it comprehended that of marriages, (not now in use,) in the direct order of the tribes, as well as of women espoused in any of the disapproved forms of marriage; such mixed and irregular progeny, though inferior in pretensions to the *Aurasa*, or legitimate son of a woman of the same class with her husband, married in one of the approved forms, being so far legally born, as to be entitled to succeed, in preference to a subsidiary son, of whatever description.(4) But all such marriages having been long since forbidden,(5) (howsoever they may in some parts of India still occur,) and, as between issue of the body, and an

(1) Ante, ch. II. p. 34.
(2) Ante, ch. IV. p. 71.
(3) Post, Append. to ch. IV. p. 212.
(4) Note to Mit. on Inh. ch. I. sect. xi. § 2, and Id. § 40.
(5) 3 Dig. 485.

adopted son, the law, as it respects inheritance, making no difference, except that the latter, being provided as a substitute, takes the entire estate only in default of the former, the subject will be treated with reference to the former only, namely, to issue legally begotten; the application holding good in general to both alike. The collective term *issue* comprehending not only as many sons as a man may chance to leave behind him, but sons' sons also, and the sons of the latter, or great grandsons,(1) it may be here remarked, that though, in former times, the eldest had his privilege,(2) the whole have, by the Hindu law, ever constituted but one heir; like heirs in *gavelkind*, or the descent to females in default of heirs male, with us; —and that the doctrine of representation obtaining in it, if the son have died in the lifetime of his father, leaving a son, and that son also die, leaving one, and then the great grandfather die, the great grandson succeeds, as his grandfather would have done, had he survived; and, according to the *Vaijayanti*, (a commentary on Vishnu,) the right of representation, in all these cases, vests likewise in the widow: (3) but according to other authorities, her claim, in such case, is to maintenance only, to be supplied her by her father-in-law, and, on his death, by his heir.(4) —But here, for a reason that will be presently given,(5) the right of lineal representation stops, unless there have

(1) Menu, ch. IX. 137.—Datt. Mim. sect. i. 13. Yajnyawalcya, 3 Dig. 63.
(2) Post, p. 193.
(3) Post, Append. to ch. VI. p. 234. C.
(4) Post, Append. to ch. VI. p. 234. C. 235. S.
(5) Post, p. 128.

been an absence in a distant country, in which case it extends beyond the fourth, as far as the seventh degree; ([1]) so that, supposing the intermediate descendants to have failed, and a son of the great grandson to survive at the death of the proprietor, he would not inherit, as he would with us, but the widow of the deceased, the next in the series, would succeed in preference; though, in the event of the great grandson surviving his ancestor, and dying, the property so inherited by him would devolve upon his son, in consequence of its having vested in the father. Under the ancient law, the representative differed, in one instance, from him whom he represented; in that, if begotten by his uncle, according to a practice subsisting in early times,([2]) he did not, though standing in the place of an eldest son, succeed to the privileges of one, but was entitled to an equal share only with his co-heirs.([3]) But this, as most other anomalous modes of filiation, having, together with the rights of primogeniture, long since ceased, it is sufficient to have alluded to the circumstance; and, for the sake of clearness, and to avoid confusion, referring to the appropriate chapter for whatever regards the adopted son,([4]) what follows will proceed upon the supposition of the deceased having separated himself from, and become independant of brothers, if he had any; —in other words, of his having died divided, or otherwise sole owner of what property he possessed; it being proposed to exhibit the succession of heirs, commencing

(1) Vrihaspati, 3 Dig. 441. 448.—Post, 188.

(2) Ante, p. 38.

(3) Menu, ch. IX. 120, 121.

(4) Ante, ch. IV. p. 71.

with an only son, or a legal representative of him, which is the same thing; in the discussion of which, some comparison will incidentally occur, between the rules of inheritance according to the English law, and those that govern it among the Hindoos; but as, among the latter, the distinction, as it prevails in ours, between real and personal property, does not for this purpose, in general, exist,(1) both species being, with them, descendible to the legal heirs, their law of *inheritance*, including what, with us, forms the law of *administration*, embraces in this respect, a wider field; comprehending every possible claimant on the property of a person deceased, as well as every description of property, of which, during his life, he was seised or possessed. On the other hand, as they apply to property, there is, in point of simplicity, no comparison between the two codes; though it may be sometimes difficult, in that of the Hindoos, to distinguish between what it exacts, and what it recommends, and expects only: as neither is it easy always to extract, with correctness and certainty, amid the involved and discordant reasonings of commentators on the subject, what the law upon any given point actually is, adverting moreover to the conflicting doctrine of different schools. (2) To perform what would be requisite in these respects, effectually, as it would require the master-hand of a Jones, or a Colebrooke; so will it be but very insufficiently supplied by the present imperfect Essay, at something like arrangement and elucidation. Meanwhile, let the Eng-

(1) Note to Jim. Vah. ch. XI. sect. v. 56.
Ante, ch. I. p. 15.

(2) Ante, Pref. p. xxvi.

lish inquirer be encouraged in his investigations by the assurance that, in pursuing them, he is relieved from much of the toil inherent in the study of the correspondent branch under his own law, as arising, with reference to real property, from the division of inheritances into different kinds, and the distinction of estates, as regarding the quantity of interest taken in them, with the doctrine of estates in expectancy; the whole of which together has, in the progress of centuries, given rise to a body of learning, in parts so nice and abstruse, and, upon the whole, so various and intricate, as to have occasioned often despair in the study of it; a branch of learning, in fact, to be acquired and retained, only by the most severe study, and uninterrupted practice.—To return from this digression.

Before the subject of the present chapter can be properly understood, it is necessary to recollect the doctrine already alluded to, in treating on adoption, constituting, as has been observed by Sir William Jones,(1) the *key*, to the whole Indian law of inheritance, and resting, as with us, upon services to be performed by the heir;—not however upon feodal ones to be rendered to a superior, but, like *frankalmoigne* with us, upon spiritual ones, to be conferred on the deceased, in extricating his spirit from its otherwise hopeless state, by a due discharge of his funeral rites.(2) Innumerable are the passages that have been collected from Hindu scripture, and heroic his-

(1) Note to 3 Dig. p. 63.

(2) Jim. Vah. ch. XI. sect. vi. 29.
3 Dig. 65. 84. 491. 525. 623.

tory, by writers on the law of the subject in question, in which benefits derived by the father, or other ancestor, through the son, grandson, or great-grandson, are stated as reasons for the preferable right of the lineal male heir, to a certain extent, before any other claimant.(1) This faculty it is, however foreign in reality to inheritance, the assumption of which (according to a learned writer) is to be resorted to, in order to give consistency to its rules;(2) and, how nicely the series of heirs is in general adjusted, with reference to the degree of benefit which each is, in this way, supposed capable of producing, is worthy of remark; the son's preferable right resting on his presenting the greatest number of beneficial offerings,(3) while the same degree is attributable, in default of their respective fathers, to the grandson or great-grandson, that is, as far as the fourth in descent, but not to any ulterior representative;—the fifth (says Menu(4)) not having any concern with the funeral cake; which accounts for representation, for the purpose of inheritance, stopping with the great-grandson; while, upon this principle, ministering equally to the peace of their departed ancestor, if (according to an authority already cited) he leave a son, and the son of another son, and the son's son of a third son, they take equal shares of his estate, *because*

(1) Menu, ch. IX. 137.

(2) Mr. Colebrooke's Preface, p. 2, to his translation of the "Treatises on "the Hindu law of Inheritance."—See also Jim. Vah. ch. XI. sect. vi. 31. 33.

(3) Jim. Vah. ch. IV. sect. iii. 36.

(4) Menu, ch. IX. 186, 187.—Jim. Vah. ch. XI. sect. vi. 29. 31. Devala, 3 Dig. 10.

they confer the benefit equally.(1) This is the general, though not the sole and universal principle;—payment of the deceased's debts, as well as nearness of kin,(2) or proximity by birth, entering as conjoint considerations;(3) —the table of succession also, which, on failure of the great-grandson, devolves on the wife, reverting, after some deviations, to the lineal kindred, but stopping, at all events, with the seventh person, or in the sixth degree of ascent or descent.(4)—In what the rites alluded to consist, and by what operation this pious office of the heir is conceived likely to be efficacious toward effecting the desired end, it does not belong to these pages to notice.(5) Sufficient be it here to state, that the right to inherit is connected with the power of benefitting; whence the title of the son begotten, before that of any other possible heir; with the anxiety of every reflecting Hindoo for male issue,—together with the law of adoption, as a substitute for it. Upon this ground, passages in books, purporting that the succession to the estate, and the right of performing obsequies, go together, have sometimes led to pretensions, founded upon the fact only of such celebration; which, however, are not to be construed, as if the mere act of solemnizing the funeral rites could give a

(1) Sir W. Jones's note to 3 Dig. p. 63,
and note to Jim. Vab. chap. XI. sect. i. 4. 34. 36. 40.—Id. sect. vi. 29.

(2) 3 Dig. 501.

(3) 3 Dig. 525. 533.

(4) Note to 3 Dig. 62.—Menu, ch. V. 60.
Jim. Vah. ch. XI. sect. i. 42.

(5) See Notes to 3 Dig. 460. 624.
Notes to sect. iv. § 72, and sect. vi. 35, of Dattaca Mimamsa.
Dubois, "On Customs of People of India;" ch. XXVII. XXVIII. and Asiat. Res. vol. vii. p. 263.

title to the succession, but that the successor, being the nearest of kin the most competent, is bound to their due performance for the deceased, to whose property he has succeeded. (1)

The Hindoo (as will be seen(2)) has inchoate, and operative rights in the property of his father; to which correspondent ones may be traced in the ancient law of England. The question in the Hindu books is, as to their extent; upon which different schools differ; inheritance, according to the Bengal school, being defeasible in the lifetime of the father, by gift, or other alienation, including (according to what has been established in the Bengal Courts) *will*, to take effect after his death; whereas, as he cannot by the Hindu law, administered upon Hindu principles, intercept the inheritance by *will*, so, by that law, according to the doctrine of the Benares school, followed as it is to the Southward, is his power of alienation in general comparatively limited and restricted, as it was formerly with us, till enlarged by successive statutes.() Universally, it may be anticipated by *partition*,—voluntary on the part of the father, or without his consent, if warranted by law; and it may be bound by adverse possession in a stranger for twenty years. (4) Civilly, or naturally, the ancestor must be dead, before

(1) Dutnaram Sing *v.* Buckshee Sing; Beng. Rep. ante 1805. p. 22. Post, Append. to ch. VI. p. 236. 241.—C.

(2) Post, ch. IX. p. 176.

(3) Ante, p. 17 to 21.

(4) Yajnyawalcya, 1 Dig. 135.—Vyasa and Vrihaspati, 3 Id. 443. Id. 442. and see p. 446.—Ante, p. 32. and Post, Append. to ch. I. p. 26.

the inheritaance (in the proper sense of the term) can vest,(1) the same distinction of heir apparent, and heir presumptive, obtaining in both codes, English and Hindu. Thus the heritable pretension of the son of a Hindoo being immediate, is *(apratiband'ha)*—" a heri-" tage not liable to obstruction;" answering with us to the heir apparent, whose right, if he outlive his ancestor, is indefeasible; while that of remoter heirs, as of brothers, uncles, and others, is distinguished, as being *liable to obstruction, (sapratibandha,)* by the intervening birth of nearer ones, so that their title is not apparent, but presumptive only.(2) What constitutes a *civil* death will appear in a subsequent chapter.(3) And as to a *natural* one, known or presumed, it is observable here, that there are parts of India, where, if a man leave his native country, to reside in another, his lands devolve upon the village in which they are situated, unless he return within a given number of years;(4) and the practice being common of going to Benares to die, and being never more heard of, and long absence being considered by sages as equivalent to death,(5) the law has assigned various periods of absence, inferring the conclusion, according to the age of the person in question at the time of his departure, the lowest being twelve years;(6) at the expiration of which, without intelligence of him having been received, the

(1) Nareda, 3 Dig. 474.—1 Id. 276.

(2) Mit. on Inh. ch. I. sect. i. § 3.

(3) Post, ch. IX. p. 185.

(4) Append. to Report on the Territories conquered from the Peishwa, by the Hon. Mountstuart Elphinstone, p. 18.

(5) 2 Dig. 472.

(6) 1 Dig. 266. 278.

heir is entitled to assume the succession; keeping certain fasts, then burning an image of his ancestor made of *Cusa*, and finally performing for him, in the prescribed form, his funeral rites.(1) To this place may be referred the enlargement of the rule, restricting the inheritance to the fourth in descent from the deceased; which must be construed as relating to residence in the same province: for, where the heirs have been residing in a distant country, the right continues to the seventh.(2)

Illegitimate children are a charge upon the inheritance, but do not inherit by the Hindu, any more than by the English law, excepting in the Sudra class.(3) Under the old law, indeed, there were instances where, in the higher classes, such issue were eventually inheritable; as in that of the son of concealed birth, (*Gudhaja*,) and in one description of the *Pauner-bhava*, or son of a twice-married woman. But these are now generally obsolete;(4) the latter only occurring still in some instances in the fourth order;(5) in which illegitimate continue to participate with legitimate sons, if there be any; and, if there be none, nor daughters, nor daughter's sons, they are then not distinguishable in point of inheritance from legitimate ones;(6)—so regardless has the law been

(1) Jim. Vah. ch. VIII.—1 Dig. 227, 228.—3 Id. 450.
Asiat. Res. vol. vii. p. 243.—Post, Append. to ch. VI. p. 237.
(2) Vrihaspati, 3 Dig. 441. 449.—Ante, p. 124.
(3) Menu, IX. 178, 179.—3 Dig. 143. 283, and ante, p. 67.
(4) Post, Append. to ch. IV. p. 205. and 208.
(5) Mohun Sing v. Chumun Rai; Beng. Rep. ante 1805, p. 30.
(6) Mit. on Inh. ch. I. sect. xii.—3 Dig. 143.
Datt. Mim. sect. ii. 26.—Datt. Chandr. v. 29, et seq.
Ante, ch. III. p. 68.

of the manners and habits of this numerous, however inferior class.

If the heir be a minor, a guardian should be appointed for him, to whom the care of his property should be committed, till he is of age to take possession of it himself. This, in the case of the Brahmin, may be upon his ending his studentship, and returning from the house of his preceptor.(1) But, in general, minority continues till the completion of the sixteenth year.(2)

Such being the right of the son, the Hindu law of inheritance corresponds so far with our own, that property under it lineally descends, and that the male issue take before the female; with this difference, that, among the Hindoos, the males in general take altogether, as do with us the females,—the claim of primogeniture, with them, having been at no time more than partially allowed, and now no longer existing;(3) and with this peculiarity also, in which it differs from all other codes, that, in default of male issue, the *widow* succeeds, her place being assigned her, in every enumeration of heirs, next after sons, and before daughters;(4) in consideration (as is said) of the assistance rendered by her

(1) Menu, ch. VIII. 27.
The Retnacara, 3 Dig. 543.
1 Id. 293, and ante, ch. III. p. 72.

(2) Ante, p. 72.

(3) Post, p. 193.

(4) Yajnyawalcya, 3 Dig. 457.—Devala, Id. 474, explained, p. 482.
Vishnu, Id. 489.—Misra, Id. 535.
Jagannatha, Id. 481.—Jim. Vah. ch. XI. sect. i.
Mit. on Inh. ch. II. sect. i. 39.—Menu, ch. IX. 185.
Beng. Rep. ante 1805, p. 64.

to her husband, in the performance of his religious duties.(1)

The *Widow*.—Whatever may have been said as to the depressed state of the sex in the East, and upon its general incompetence to inherit,(2) it must be admitted that a "faithful wife," whether during the life of her husband, or on his decease, is, by the Hindu law, an undoubted object of its care, if not of its unqualified liberality. In what degree she is so, has already in part appeared in the chapter on *Marriage*,(3) and will be farther considered under *Charges on the Inheritance*,(4) and in treating upon *Widowhood*.(5) She is conspicuously so in her right to inherit; a right vested in her by marriage, to be perfected on the death of her husband, dying without leaving male issue. This obtains universally, the deceased, at his death, having been separated from co-heirs.(6) But, if he die a member of an undivided family, the consequence, with respect to the widow, varies, according as the doctrine of the Bengal or Benares school prevails, as has been already stated.(7)

Her right, however, in any case, to take at all, as heir, has been contested, upon passages and texts ill

(1) 3 Dig. 456.

(2) Jim. Vah. ch. XI. sect. vi. 8. 11, and notes.
3 Dig. Text ccccxiii.—Id. p. 528, 529.

(3) Ante, ch. II. p. 34.

(4) Post, ch. VIII.

(5) Post, ch. X.

(6) Jim. Vah. ch. XI. sect. i. 2. 6.—Mit. on Inh. ch. II. sect. i. 39.
Vrihaspati, 3 Dig. 458.—*Vriddha* Menu, 3 Dig. 478. 483.

(7) Ante, p. 121.
And Post, Append. to ch. VI. p. 232. 233. 550.

understood, and upon arguments, carrying with them almost their own refutation. (1) Among other objections to it, her dependant state has not been overlooked; (2) and her incompetency has been insisted upon, as an inference from the religious use to which wealth is destined; (3) as if this were its only use; (4) not to mention the direct answer this argument receives, from the wife's performance of religious ceremonies, in conjunction with her husband in his lifetime; whence her appellation of *patni*, (5) as well as her celebration of acts after his death, spiritually beneficial to him, only in a degree less than those performed by a son. (6) Passages postponing, if they do not omit her altogether in the order of heirs, must be construed as applying to the case, where the deceased was an unseparated brother, whose estate, failing male issue, vests in the surviving parceners;—a point, upon which, as already intimated, the schools differ. (7)—It has been moreover contended, that, at all events, her succession must depend upon amount; so that, if the property be but small, it may be allowed; but, if considerable, she is to be satisfied with maintenance; (8)—a criterion, obviously of too arbitrary and uncertain a nature, to have the effect of

(1) Jim. Vah. ch. XI. sect. i. § 1.
(2) Mit. on Inh. ch. II. sect. i. § 25.
(3) Mit. on Inh. ch. II. sect. i. § 14.
Text ccccxiii. 3 Dig. 484. 317.
Jim. Vah. ch. XI. sect. vi. § 13.
(4) Mit. on Inh. ch. II. sect. i. § 22.
(5) Note to Jim. Vah. ch. XI. sect. i. § 47.
Note to Mit. on Inh. ch. II. sect. i. § 5. 29.
(6) Menu, IX. 28.—Jim. Vah. ch. XI. sect. i. § 43.
(7) Ante, p. 121.
(8) Mit. on Inh. ch. II. sect. i. § 31. 33. 35.

regulating a right. But, among all these spurious and repudiated doctrines, none has been more insisted upon, than that her right to inherit is inseparably connected with her appointment, by means of another, to raise up issue to her husband;(1) in which case the son so produced, and not the widow, would be heir; a practice also which, while it prevailed, was reprobated; and which, for a time that may be said to be beyond memory, has been no longer in use.

Setting aside the above objections, as not entitled to regard, the right of the widow, to succeed as heir to her husband, in default of male issue, is subject to the single condition, of her having been faithful to him during coverture. An unchaste wife is excluded from the inheritance. But, nothing short of actual infidelity in this respect disqualifies;—nor, the inheritance once vested in her, is it liable to be divested, unless for loss of caste, unexpiated by penance, and unredeemed by atonement.(2) Prior to the *(Cali)* present age, while the practice prevailed, of contracting marriages in various tribes, rank and privilege among wives was regulated by class, she, among them, who was of the same class with her husband, having precedence, without regard to any other consideration.(3) But, such license not now obtaining, where a man has left more widows than one, and no son by any, she who was first married, being

(1) Mit. on Inh. ch. II. sect. i. § 8. 10, 11. 15. 18. Post, Append. to ch. VI. p. 239.—S.

(2) Mit. on Inh. ch. II. sect. i. 30. 37.—3 Dig. 479. Post, Append. to ch. VII. p. 270. 272.—C.

(3) Jim. Vah. ch. XI. sect. i. 47.—3 Dig. 484.

the one who is considered to have been married from a sense of duty, succeeds, in the first instance;(1) the others inheriting in their turn, as they survive,(2) entitled, in the mean time, to be maintained by the first; it being a principle, that whoever takes the estate of the deceased, must maintain those whom he was bound to support.(3) It may be here noticed, that the widow has not the same dominion over property inherited by her from her husband, that she has over her *Stridhana*, emphatically called "woman's property;" as has already been seen in a former chapter;(4) as also, that the descent of the one and of the other, is different; as will appear in the chapter treating upon *widowhood*,(5) not to interrupt the series of heirs, and course of inheritance, forming the proper subject of the present.—To proceed, therefore, on the supposition of the deceased having left neither issue male, nor widow, but daughters.

Daughters.—The right of *daughters* to succeed, in default of sons and widow, is not to be confounded with that of the *appointed* daughter, under the old law. That appointment was one of the many substitutions for a son; and, by a fiction no longer subsisting, regarded as one. The daughter under consideration takes as a principal in her own right, in default of the widow, who has precedence. The appointed daughter derived her title from the will and act of the father. The daughter not

(1) 3 Dig. 461. 489.—Ante, ch. II. p. 56.
(2) 3 Dig. 486.
(3) 1 Dig. 321.
(4) Ante, ch. I. p. 25.
(5) Post, ch. X. p. 248.—Daya Crama Sangraha, ch. I. sect. ii. 4.

appointed, but succeeding, derives hers from the law, having regard to the general principle of conferring, at his obsequies, benefits on the deceased.(1)

Daughters, like sons, conferring proportionate benefits on the deceased, take in common; but with this difference, that they succeed, not indiscriminately, but in order, as they are single, married, or widows; the single, though there should be but one of that description, taking the whole of the inheritance first, to the exclusion of the rest of her sisters during her life. The single having enjoyed it, it vests next in the married ones, and finally in such as are widows, with a proviso, in the instance of the married, that they be mothers of sons, or, likely to become so:(2) on the ground that daughters inherit, in right of the funeral relation to be presented by their sons; while the son succeeds in his turn, as being the person to offer it.(3) This is analogous to the law, as applicable to the *appointed* daughter, before that substitution, with others of a more questionable kind, became obsolete;(4) and it has the effect of excluding childless widows. It is observable, however, that the Mitacshara, so far from sanctioning any such proviso, has, in express terms, controverted the notion, that

(1) Menu, ch. IX. 130.—Jim. Vah. ch. XI. sect. ii. 1.
3 Dig. 592—597.—Mit. on Inh. ch. II. sect. ii.
Vrihaspati, 3 Dig. 186.—Vajnyawalcya, 457.
Vishnu, 489.—Nareda, 491.

(2) Jim. Vah. ch. XI. sect. ii. § 1. 4. 12. 25. Note.—Mit. on Inh. ch. II. 2, 3.
Gudhadur Serma *v* Ajodhearam Chowdry, Beng. Rep. ante 1805, p. 6.
3 Dig. 491.—Post, Append. to ch. VI. p. 239.—S.

(3) Jim. Vah. ch. XI. sect. xi. § 2. 17.
3 Dig. 498, et seq.—Id. 481.

(4) Menu, ch. IX. 132, 133.

women inherit only through male issue.(1) Moreover, it is said that, in Southern India, widows, if un-endowed, inherit before married daughters endowed, and that the Smriti Chandrica, commenting on the term un-endowed, specifically enumerates widows. According to one opinion, not only the sons of daughters, but the daughters of daughters also inherit, in default of sons;(2) but this does not appear to have been sustained: on the other hand, where there are sons, their right of succession is postponed to that of other daughters of the deceased;(3) and, where such sons are numerous, when they do take, they take *per stirpes*, and not *per capita*.(4) Authorities, postponing still farther their right, have been denied;(5) but the succession in the descending line from the daughter proceeds no farther, the funeral cake stopping with the son;(6) which is an answer to the claim of the son's son, grounded on the property having belonged to his father.(7) Neither, according to Jimuta Vahana, on failure of issue, does the inheritance, so descending on the daughter, go, like her *Stridhana*, to her husband surviving her, but it goes to those who would have succeeded, had it never vested in such daughter:(8) but

(1) Mit. on Inh. ch. II. sect. ii. § 3.—3 Dig. 493. 591.
Post, Append. to ch. VI. p. 239.—S.
(2) Balambhatta, note to Mit. on Inh. ch. II. sect. ii. § 6.
(3) Jim. Vah. ch. XI. sect. ii. § 23—25.
Daya Crama Sangraha, ch. I. sect. iv.
(4) 3 Dig. 501.
(5) Baloca, Jim. Vah. ch. XI. sect. ii. § 27.—Misra, 3 Dig. 535.
(6) Jim. Vah. ch. XI. sect. ii. § 2.
(7) Compare 3 Dig. 502, with the Comment on Nareda, Id. 491.
(8) Jim. Vah. ch. XI. sect. ii. § 30.—3 Dig. 494. 497.
Daya Crama Sangraha, ch. I. sect. iii.

according to the Southern authorities, it classes as *Stri-dhana*, and descends accordingly. And, upon the same principle, the husband is precluded during her life from appropriating it, unless for the performance of some indispensable duty, or under circumstances of extreme distress.(1) Whereas, the daughter's own power over it is greater than that of the widow of the deceased, whose condition is essentially one of considerable restraint.(2) In default therefore of issue, quitting the descending line, the *melancholy succession*, as it has been called, takes place; and the inheritance *ascends*.

Parents.—The feudal abhorrence of succession from sons to parents, (*hæreditas nunquam ascendit*,(3)) upon whatsoever reason founded, revolts common minds, particularly as it excludes the father, to whom by nature we are so bound; for whose services and bounties the offspring is in general so indebted. Peculiar, in its full extent, to our own laws, with such as have been deduced from the same original, it may be remarked that, with regard to the mother, it existed in the codes of Jerusalem, of Athens, and of early Rome, the sex having been everywhere, and at all times, comparatively restricted in the amount and enjoyment of property; but where, in England, feudal subtlety has not been allowed to prevail, namely, in the distribution on the death of the owner of *personal* effects, the claims in question have had a considerate attention paid to them; and justice and nature,

(1) Mit. on Inh. ch. II. sect. xi. § 31, et seq.—Ante, p. 27.

(2) Post, ch. X. p. 244. 251.—3 Dig. 465, et seq.

(3) Blackst. Comm. vol. ii. p. 211. Chitty's Ed. 1826.

in this part of our juridical arrangements, have been vindicated. In one particular, the Hindu law, according to the sentiments of some by whom it has been handed down, is at variance with that of every other people, to whom we are accustomed to look, as to a standard for legislative wisdom; in that, failing wife and issue, they represent the mother as succeeding first, and the father not till after her;(1) her prior title resting with some,(2) on the pains and merit of child-bearing; with others,(3) on the fanciful notion of her comparative propinquity to her issue, so as best to satisfy the rule of Menu, that "to the nearest *Sapinda*, the inheritance "belongs;"(4) though, upon another principle, equally familiar among Hindu jurists, namely, that "the seed "is preferable to the soil,"(5) the right, in this respect, would be rather with the father.(6) Accordingly, respecting the pretensions of the mother, much difference of opinion prevails, as appears from a learned note by the translator of the Mitacshara;(7) assigning, in conformity with some authorities, priority to the father; with others, joint, co-ordinate participation; and, alleging with a third set, the vague criterion, already alluded to,(8) of relative respectability, in point of personal qualifications, the one to the other. Another idea has been that,

(1) Mit. on Inh. ch. II. sect. iii. 2.
(2) 3 Dig. 504, 505.
(3) Mit. on Inh. ch. II. sect. iii. 3.
(4) Note to Mit. on Inh. ch. II. sect. iii. 3.
(5) Menu, ch. IX. 35.—3 Dig. 215, et seq.
(6) Jim. Vah. ch. XI. sect. iii.—3 Id. sect. iv. 5.
(7) Note to Mit. on Inh. ch. II. sect. iii. 5.
(8) Ante, p. 99.—Post, 193.

on failure of the mother, not the father, but the paternal grandmother succeeds, excluding the father altogether, as the surer means of preserving the property in the same tribe; upon the ground that, the father succeeding, the estate becomes a paternal one, and, as such, may devolve as well on sons belonging to a mixed class, as on issue by a wife of his own:—whereas, if taken by the grandmother, it descends, as a maternal one, to persons of the same class only,—namely, to her daughters and their representatives.(1) Of this solicitude to preserve the inheritance in the tribe to which it had belonged, an early instance is exhibited, in the decree made in the case of the daughters of *Zelophchad*, of the tribe of *Manasseh;* upon whose death, without sons, it was settled, that they should succeed to their father's land; but, for the reason given, that they, and others on whom the inheritance should devolve under the like circumstances, should marry in their own tribe.(2) And the English lawyer may be reminded by it of the pains taken, so far as regards real property, to justify, upon feudal principles, a similar exclusion of the father from inheriting to his son, under our own code.(3) But, whatever may have been formerly the force of this argument, as it respects Hindoo fathers, there must have been an end of it, from the time that marriages among them, with women of inferior classes, ceased to be legal.(4) Although, between the different opinions, Jagannatha, commenting on the sub-

(1) Mit. on Inh. ch. II. sect. iv. 2, and note to Id. sect. iii. 3.
(2) Numbers, XVII. 1. XXXVI. 6.
(3) 2 Blackst. Comm. p. 210.
(4) Ante, ch. I. p. 40, and 3 Dig. 485.

ject, professes neutrality, declaring that there is no certainty on the point,(1) it is evident that the inclination of his judgment was in favour of the father, upon the ground that influences throughout the Hindu law of inheritance, namely, his comparative efficacy in performing obsequies to the deceased; upon which ground, the son of the daughter is preferred in succession, as well to both parents, as to the brother.(2) Of a son dying childless, and leaving no widow, Menu, according to the gloss of Culluca Bhatta, says, "the father and mother shall take the "estate."(3) This, according to Hindu reasoning, establishes in the father the right of prior enjoyment; other versions of the same text, omitting the father, have been construed to suppose the father dead;(4) and, if the opposite views that have been taken of the question are resolvable into nothing more than different readings of the text of Vishnu, each resting upon respected authority, reason ought to decide between them with Jagannatha, in favour of the father; upon the principle, that, "if two texts differ, reason, or that which it best sup-"ports, must in practice prevail, when the reason of the "law can be shewn."(5) That the father takes first, is the doctrine of the Bengal school; resting the subse-

(1) 3 Dig. 503.

(2) Jim. Vah. ch. XI. sect. iii. § 3.

(3) Menu, ch. IX. 217.

(4) Mit. on Inh. ch. II. sect. iii. § 2.
Jim. Vah. ch. XI. sect. iii. § 2.
3 Dig. 503.—See also Menu, ch. IX. 185.

(5) 3 Dig. 489.—Jim. Vah. ch. XI. sect. i. § 5, and note.
Id. ch. XI. sect. iii. § 1.—3 Dig. 527, et seq.
Yajnyawalcya, 3 Dig. 505.

quent title of the mother on her claims as having born the deceased, and nursed him in his infancy. Step-mothers, where they exist, are excluded ;(1) and, in whatever order the natural mother inherits, she is, like the widow, taking as such,(2) restricted from aliening the estate, unless for her necessary subsistence, or for pious purposes beneficial to the deceased ; and her power over it, even for these, is allowed but to a moderate extent.(3)

Brothers.—Had the property been the mother's, in the Hindu sense of "woman's property," it would descend on her death to her daughters ; but, having been inherited by her from her son, it passes, according to the law as practised in Bengal, not to her heirs, but to his ;(4) which, on failure of issue male of the proprietor, of widow, issue female, and parents, are his *brother* or *brothers ;* those of the whole being preferred to those of the half-blood ; those of the half succeeding only on failure, or in default of those of the whole.(5) With regard to the brother in general, his title rests on the benefits he confers, by the offer of oblations, in which the deceased owner of the property participates, and in presenting

(1) Menu, ch. IX. 185.—Jim. Vah. ch. XI. sect. vi. 3, 4.
Mit. on Inh. ch. II. sect. iii. 3, 5.
Bishenpirea M. v. R. Soogunda ; Beng. Rep. ante 1805, p. 40.
Barainee Dibah v. Hirkishor Rai ; Id. p. 42.
Rychundoo Narain Chowdry v. Goculchund G. ; Beng. Rep. 1805, p. 46.
Daya Crama Sangraha, ch. VI. 23. VII. 3.

(2) Post, p. 247.

(3) Mt. Bijya Dibeh v. Mt. Unpoorna D. ; Beng. Rep. 1806, p. 84.

(4) Note to Jim. Vah. ch. XI. sect. iv. 7.

(5) Jim. Vah. ch. XI. sect. v. § 1. 8, 9. 11.
Mit. on Inh. ch. II. sect. iv.—3 Dig. 506.
Gudhadur Serma and another v. Ajodhearam Chowdry ;
Beng. Rep. ante, 1805, p. 6.—Daya Crama Sangraha, ch. I. sect. vii.

others which the deceased was bound to offer; and, in this respect, occupying his place.(1) And as, between the whole and the half brother, the former takes first, as presenting oblations to six ancestors, which the deceased was bound to offer, and three oblations, in which he participates: while the latter presents none to ancestors; but presenting three in which the deceased participates, he is superior to the nephew; who, accordingly, though son of a brother of the whole blood, is postponed in succession to his uncle of the half,(2)—a preference nevertheless that has been censured.(3) A distinction is glanced at, as varying the succession, according as the property in question happens to have been inherited, or acquired by the deceased, but it does not appear to be established.(4)

Nephews.—The line of brothers being exhausted, their sons (or the nephews of the deceased, as already intimated) succeed, the whole being still preferred to the half-blood, (5)—a son of an uterine brother conferring benefits on the mother of the deceased proprietor. (6) To which is to be added, that, unlike sons of daughters, they take *per capita,* not claiming *jure representationis,* as if their fathers had had a vested interest in their brother's property, before their decease; whereas the right only vested in them by the demise of the owner, their fathers

(1) Jim. Vah. ch. XI. sect. v. § 3.—Mit. on Inh. ch. I. sect. iv.
(2) Jim. Vah. ch. XI. sect. v. § 12.
(3) Note to Mit. on Inh. ch. II. sect. iv. 6.
(4) 3 Dig. 506.
(5) Jim. Vah. ch. XI. sect. vi. § 1, 2.
Mit. on Inh. ch. II. sect. iv. § 7, 8.—3 Dig. 518. 527.
Daya Crama Sangraha, ch. I. sect. 8.
(6) 3 Dig. 519. 524.—Daya Crama Sangraha, ch. I. sect. 8. 1.

being at the time dead.(1) The sons of nephews, or grand-nephews next take; but here the succession in the male line from the father direct stops, the great-grandson being too distant in degree to present oblations; (2) and, failing heirs of the father down to the great-grandson, the inheritance devolves on his daughter's son, in preference to the uncle of the deceased; as, failing male issue of the latter, it descends to *his* daughter's son, in preference to his brother.(3) But the *sister*, being, on account of her sex, no giver of oblations at periodical obsequies, is excluded; as would be the case with the daughter, but that her right of succession, like the wife's, is provided for by an express text; (4)—the general principle being, that the sex is incompetent to inherit.(5) Such appears to be the law of the Bengal provinces; but it is not to be taken as universal, opinions existing, that the term "brethren," in the enumeration of heirs, in the Mitacshara, includes *sisters;* as "parents," have been seen to do *father* and *mother;* but they stand controverted: (6) Jagannatha also observing that "it is nowhere "seen, that sisters inherit the property of their brothers;"(7) and, referring to a text that gives colour to their pretensions, he adds, that it is sufficiently explained, "as

(1) Balambhatta, note to Mit. on Inh. ch. II. sect. iv. 7.
(2) Jim. Vah. ch. XI. sect. vi. § 7.—Menu, ch. IX. 186.
3 Dig. 526, 527.
(3) Jim. Vah. ch. XI. sect. vi. § 8.—3 Dig. 527.
(4) Note to Jim. Vah. ch. XI. sect. vi. 8.
(5) Ante, p. 134.
Post, Append. to ch. VI. p 239.
(6) Note to Mit. on Inh. ch. II. sect. iv. § 1.
(7) Post, Append. to ch. VI. p. 243. 245. C. and S.

"relating to the allotment of an adequate sum to defray "their nuptials."(1) The samė observation applies to the claim of *nieces.*(2) A sister's son inherits in Bengal; but not in the provinces that follow the Mitacshara. (3)

To this extent the law of inheritance is established with little variation, comprehending, as has been seen, the deceased's family, and near relations, viz.: his issue male and female; his wife, who takes immediately in default of sons; his parents, brothers, nephews, and grand-nephews; the *competency* to benefit him, in the solemnization of obsequies, at once forming the consideration for, and the *degree* of it determining the order of succession; (4)—benefits conferred by the nearest of kin being regarded of more importance than those offered by one more distantly allied: (5)—just as ability for personal service constituted the claim of heirship, among the feudal nations, including our own. And as, among them, together with the nations of antiquity, the *agnatic* succession was in general preferred, so is it among the Hindoos; the instances, in which females are allowed to inherit, being deemed exceptions. (6)

Failing issue of the father, inheritance continues to ascend upwards to the grandfather, and great-grandfather, the grandmother and great-grandmother, the

(1) 3 Dig. 517. 28.—Menu, ch. IX. 212.
Mt. Runnoo v Jeo Rannee; Beng. Rep. p. 8.

(2) Append. to ch. VI. p. 240.—S.

(3) Rajchunder, N. C. v. Goculchund; Beng. Rep. ante 1805, p. 46.

(4) Jim. Vah. ch. XI. sect. vi. § 29. 31.

(5) 3 Dig. 526. 455.

(6) Note to Jim. Vah. ch. XI. sect. vi. 8.
Gungadutt Jha v Sree Narain Rai; Beng. Rep. 1812, p. 325.

latter being preferred in time, by those who contend for the precedence, in succession of the mother before the father; descending also downwards to their respective issue, including daughters' sons, but not daughters; and with the same distinction that has been already noticed, as between the whole and the half-blood. But, in proportion as the claim becomes remote, it varies in particulars with different schools, and authors; for the details of which, being beyond the scope of a work so general as the present, recourse must be had to the summary of *Sricrishna Tercalancara*, (1) and especially to the two translated treatises on the subject, with the notes and remarks of their learned translator; as well as to the "Digest," expressly on the law of "Successions."(2)

In default of natural kin, the series of heirs, in all the classes, that of the *Brahmin* excepted, terminates with the preceptor of the deceased, his pupil, his priest hired to perform sacrifices, or his fellow-student, each in his order; (3)—and, finally, failing all these, the lawful heirs of the Cshatrya, Vaisya, and Sudra, are learned and virtuous Brahmins; (4)—a description, however special, yet

(1) Post, p. 253.—For a character of this author, see Pref. to Treatises on Inheritance, translated by Mr. Colebrooke, p. vi.
Post, Append. to ch. VI. p. 246.

(2) Jim. Vah. ch. XI. sect. vi. to the end.
Recapitulation by Sricrishna Tarcalancara.—Id. p. 224. and Append. to ch. VI. p. 253.
Mit. on Inh. ch. II. sect. v. and vi.
3 Dig. 525—532.—Menu, ch. IX. 187.

(3) Jim. Vah. ch. XI. sect. vi. 24.
Mit. on Inh. ch. II. sect. vii.—3 Dig. 533. 444. 504.

(4) Jim. Vah. ch. XI. sect. vi. § 27.—Mit. on Inh. ch. II. sect. vii. § 4.
3 Dig. 537.——Post, p. 310.
Daya Crama Sangraha, ch. I. sect. x. 27, et seq.

too comprehensive to be consistent with the right of escheat, for want of heirs, in the king; and, therefore, it has been narrowed, in construction, to such as reside in the same town or village. (1) In the event of the estate of any of these vesting by inheritance in a Brahmin, as he, being such, cannot perform obsequies for one of an inferior tribe, the duty may be discharged by the substitution of any qualified person, equal in class with the deceased: and, in all cases, where the heir is under a disability, he must take the same course, paying the person employed for his service. (2)

Failing all preceding claimants, the property of any of the inferior classes vests, by escheat, in the king: who, as with us, may be said to be, in this respect, *ultimus hæres;* (3) and, as an incident, he is to cause obsequies to be performed for the deceased. (4) But the estate of a Brahmin descends eventually, and ultimately, to Brahmins, or learned priests. (5) That it cannot be taken as an escheat by the king, "This (says "Menu) is a fixed law." (6) For the king to take it under any circumstances, or for any purpose, other than that of protection, and preservation for the rightful owner, would be sacrilege, equivalent to that of appro-

(1) Jim. Vah. ch. XI. sect. vi. § 27.—3 Dig. 537.

(2) 3 Dig. 545, 546.

(3) Jim. Vah. ch. XI. sect. vi. § 34.
Mit. on Inh. ch. II. sect. vii. § 6.
Vrihaspati, 3 Dig. 538.

(4) The Vishnu Purana, 4.—3 Dig. 623.

(5) Sancha and Lichita, 3 Dig. 539.—1 Id. 469.
Mit. on Inh. ch. II. sect. vii. 5.
Post, Append. to ch. VI. p. 247.—E. and vide post, 310.

(6) Menu, ch. IX. 189.

priating what has been consecrated to the gods.[1] Rather than it should so escheat, should there be none of the same class competent to take it, (meaning probably, as before, in the same town,) it is "to be cast "into the waters;"[2]—a figurative declaration, doubtless, never intended to be literally, and universally enforced.

As holy mendicants, and avowed devotees, such as hermits,[3] ascetics,[4] and professed students of theology,[5] in abdicating all worldly ties, lose their title, as heirs to those, to whom they are by nature related,[6] so is any property that they have, such as the hoard of wild rice belonging to a hermit, the gourd, clout, and other similar effects of an ascetic, and the books, clothes, and the like, of a student,[7] transmissible, not according to the general law of inheritance, but among themselves, as with us in the case of corporations.[8] Of such successions an instance will be found in the Appendix,[9] and several in the Bengal reports, referable to the religious order of *Sanyasis*, or *Gosains;* who, being restricted from marrying, and consequently precluded from leaving legitimate issue, are, on their death, succeeded in their rights and possessions by their *Chelas,*

(1) 3 Dig. 587.
(2) Nareda, 1 Dig. 335, 336.—3 Id. 541.
(3) Vanaprasta.
(4) Yati, or Sanyasi.
(5) Brahmachari.
(6) Post, p. 164.
(7) Note to Jim. Vah. ch. XI. sect. vi. § 36.
(8) Jim. Vah. ch. XI. sect. vi. 35.—Mit. on Inh. ch. II. sect. viii. 3 Dig. 546.—Daya Crama Sangraha, ch. I. sect. x. 35, et seq.
(9) Post, Append. to ch. VI. p 218.

or adopted pupils.(1) It may be added here, that lands endowed for religious purposes are not inheritable at all as private property, though the management of them, for their appropriate object, passes by inheritance, subject to usage; as in the case of many of the religious establishments in Bengal, where the superintendance is, by custom, on the death of the incumbent, elective by the neighbouring *mohunts*, or principals of other similar ones.(2)

Such is, by the Hindu law, the course of inheritance, where it is not obstructed by any cause of exclusion; and subject, in all cases, to particular obligations and charges. These causes and incidents will constitute the subject of the two following chapters.

(1) Beng. Rep. 1806. p. 73. 92.—Id. 1807. p. 144.—Id. 1810. p. 246.—Bombay R. p. 397.

(2) Elder Widow of Rajah Chutter Sein *v.* younger Widow of ditto; Beng. Rep. 1807. p. 103.
Narain Das *v.* Bindhabun Das, Id. 1814. p. 481.
Post, Append. to ch. VI. p. 250. Sir W. Jones.
Id. to ch. IX. p. 369.

CHAP. VII.

ON DISABILITIES TO INHERIT.

EXCLUSION from inheritance, with the Hindoo, rests, in general, upon the same principle with succession to it; *i. e.* it is connected with the obsequies of the deceased; from their incapacity to perform which, the excluded are incompetent as heirs.(1) The causes of it are sufficiently numerous; defects both of body and mind, together with vice, constructive as well as actual, being attended with this effect; and lastly, devotion to any of the religious orders.

At first sight, it appears harsh to divest of their heritable rights, not only idiots and madmen, but the deaf, the dumb, and the blind, the lame, and the impotent;(2) and, certainly, disqualification, in this respect, is extended, by the law in question, beyond what takes place in our own, or other codes; but when it is considered, how unfitted these in general are for the ordinary intercourse of the world,(3) and that they are, by the same law, anxiously secured in a maintenance for life, chargeable upon those who replace them as heirs, the severity of the enactment is not only in some degree

(1) Jim. Vah XI. sect. vi. 31.

(2) Menu, IX. 201, 202.—Jim. Vah. ch. V. § 7, et seq.
Mit. on Inh. ch. II. sect. x.—Daya Crama Sangraha, ch. II.
1 Bombay R. p. 411.

(3) Baudhayana, 3 Dig. 316.—2 Dig. 2.

abated, but it even admits of comparison with our own institutions. The idiot and lunatic are not indeed, with us, disinherited; but in effect, their condition, while their infirmity continues, differs but in name from that of the Hindoo, alike destitute of reason. Their property is, by the English law, vested in others, subject to their being maintained out of it; which is precisely the condition of the Hindoo, under similar circumstances; with this in his favour, that the obligation of maintenance, on behalf of the excluded in general, is rendered as cogent as possible; any failure in it being not only a cause of disherison in those, by whom it is withheld, but denounced moreover for punishment in another world;(1) thus, in the instance of persons, not only wretched and helpless, but, circumstanced as they are, peculiarly liable to be neglected, establishing it not as a civil merely, but as a solemn right. And it is only where these infirmities are coeval with birth, that the disability attaches: though Jagannatha seems to make the case of the madman an exception in this particular;(2) and, of the impotent (who is also excluded) it is said by a sensible author, to be indifferent, whether he is naturally so, or by castration.(3) The idiot is described as one incapable of discriminating right from wrong, and insusceptible of instruction;(4) and various

(1) Menu, IX. 202.—Mit. on Inh. ch. II. sect. x. § 5.—3 Dig. 320.

(2) 3 Dig. 314.—Vid. tamen Id. 304.

(3) Balambhatta, note to Mit. on Inh. ch. II. sect. x. § 1.
Qu. tam. et vid. 3 Dig. 320.

(4) Mit. on Inh. ch. II. sect. x. § 2.—Jim. Vah. ch. V. § 9.

causes are assigned for that madness which disqualifies.(1) The deaf, the dumb, and the blind are, with us, severally, as such, no way affected in their rights; but, if a man be born destitute at once of the power of hearing, speaking, and seeing, the avenues of knowledge thus shut up, and the requisites of a social being denied him, he is, by our law, looked upon as an idiot, and liable to be treated accordingly. And, upon the same principle, the ground of their exclusion by the Hindu law is stated by one writer to be their want of initiation and investiture, arising from their unaptness for the requisite studies.(2) By this law, privation of any one of these faculties excludes from inheritance, as does lameness; but it must be entire; that is, the individual must be so lame, as not to be able to walk on either foot; and so, as to his hands, he must be deprived of the use of both.(3) To induce disinherison with us, from bodily defect, the birth must be a monstrous one; for, however deformed, or deficient, if it have human shape, it may be heir.

But neither are these, by the law under consideration, the only natural visitations productive of this civil disability. Believing, as we do, in the resurrection of the body, we remain ignorant as to the intermediate state of the soul after death, possessing in that particular no distinct revelation. But the Hindoo conceives his attainment of supreme bliss, in the reunion of his spirit

(1) Mit. on Inh. ch. II. sect. x. § 2.
(2) Jim. Vah. ch. V. § 18.
(3) 3 Dig. 321, 322.—Jim. Vah. ch. V. § 10.

with its author, to be subject to innumerable transmigrations, according to circumstances, and especially according to his conduct in the present life;([1])—a notion, (however originating) that appears to have been widely adopted in ancient times.([2]) Hence his tenderness to sentient beings of every description, and reluctance to the shedding of blood; with his habit, sanctioned by law, of attributing to delinquency, in a former state of existence, a great proportion of the physical infirmities to which flesh is heir. Universally, the sin of the parent but too often manifests itself in the debility of the offspring; and the individual, in various ways, feels in his frame the direct fruits of his own vicious indulgence. But, with the timid and superstitious Hindoo, overlooking natural causes, maladies, if extreme, are regarded as an expression of the divine displeasure at vice and crime, indulged and perpetrated in a prior form; which it remains for the actual sufferer to expiate, forfeiting in the mean time his succession. "Some evil-minded "persons, (says Menu,) for sins committed in this life, "and some for bad actions in a preceding state, suffer "a morbid change in their bodies."([3]) Reproduceable to the extent of seven successive births,([4]) of these

(1) Menu, ch. VI. 61.—Id. ch. XII. 16, et seq.

(2) St. John, ch. IX. ver. 1.
Non interire animas, sed ab aliis, post mortem, transire ad alios. (Cæsar Comm. lib. vi. 14.) Whence Horace's description, *non paventis funera Galliæ.* Upon which the Scholiast says, *verè persuasione rursus renascendi mortem non timebant.* And, to the same persuasion may perhaps be referred that passive courage, so characteristic of the Hindoos.—See also Ovid's Met. lib. xv. l. 153.

(3) Menu, XI. 48.—Post, Append. to ch. VII. p. 257.

(4) Satatapa, 3 Dig. 313.

morbid and sinful marks, presumptive of crime, and obstructive of inheritance, a copious and minute list is added;(1) of which some of the specimens are sufficiently appropriate, with reference to the offence they are considered as representing. The disease that disables, (an obstinate, or an agonizing one,) must be ascertained to be the sign of an atrocious crime, or it has not the effect of excluding;(2) it being, not the disease, but the sin that is the cause of the disability;(3) and hence it may be removed by penance,(4) the impediment continuing to operate, only so long as penance remains unperformed.(5) Thus restored, inheritability follows; there being said to be no case, in which a man competent to the one, is not qualified for the other.(6) Of *obstinate* diseases, *marasmus*, or atrophy, is mentioned as an instance; of the *agonizing*, leprosy; but it must be of the sanious, or ulcerous (the worst) kind;(7) of which a text of the *Bawisha Purana* gives a disgusting description.(8)

If vice, thus imputed by inference, of which the indi-

(1) Menu, XI. 49, et seq.
(2) 3 Dig. 314.
(3) 3 Dig. 312.

———————— necesse est
Multa diu concreta modis inolescere miris;
Ergo exercentur pœnis; veterumque malorum
Supplicia expendunt. ÆN. VI. v. 737.

(4) Menu, XI. 209, et seq.
(5) Post, Append. to ch. VII. p. 261. 268.—E.—Id. p. 272.—C.
(6) 3 Dig. 305.
(7) 3 Dig. 303. 309. 311, 312.—Mit. on Inh. ch. II. sect. x. See case of leprosy, as justifying suicide, with its aiders and abettors; Beng. Rep. 1810, p. 239 and 321.
(8) 3 Dig. 309.

vidual is unconscious, is to be so punished, and requires to be so expiated, much more that of which, in his actual person, the guilt of the delinquent is established by confession, or proof. "All those brothers (says Menu) "who are addicted to any vice, lose their title to the "inheritance."(1) And, though free from vice, if, destitute of virtue, a son neglect fulfilling, to the utmost of his power, prescribed duties, he is excluded from participation. Passing by positions so general, and which have not been uniformly expounded, certainty will be best sought in particular instances. By some, vice, excluding from inheritance, is resolved into the unwarrantable pursuit of wealth by robbery, larceny, crimes against the person, with inferior delinquencies.(2) Of these, such as amount to felonies, are attended with forfeiture by our own law. Whether this explanation of the term comprehends *gaming*, must be collected from various authorities,(3) compared as to weight and number. The Digest, reviewing different opinions on the point, says, that many authors (among whom is included Culluca Bhatta) acknowledge the exclusion of a man addicted to it, and similar vices;(4) while others are alluded to, according to whom, the persons in question are not deprived of their shares: but, whether by this, or by whatever other means they *dissipate* that

(1) Menu, IX. 214.—Jim. Vah. ch. V. § 13.—3 Dig. 299. 302, et seq. Daya Crama Sangraha, ch. III. 2, et seq.

(2) Jim. Vah. ch. v. 13.—Mit. on Inh. ch. II. sect. x. 3. Vrihaspati, 3 Dig. 230. 301.—Nareda, Id. 303.

(3) Nareda, 3 Dig. 140.—Apastamba, 3 Dig. 298.

(4) 3 Dig. 300.—Daya Crama Sangraha, ch. III. 6.

wealth, in which not themselves alone have an interest, they lose of their inheritance *pro tanto;* it becomes matter of account; and their allotment, on partition, is diminished, by so much as they have squandered or wasted, the difference, if against them, constituting a debt;(1) leaving it to the pursuit of courses, more distinctly criminal, to work at once an entire forfeiture.(2) Though our own have not adopted the construction of the Roman law, which regarded and treated the notorious prodigal as *non compos*, nor the policy of Solon, which branded him with perpetual infamy, it may be recollected that dissipation of his feud was, by the law of feuds, a cause of forfeiture. *Si vassallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*(3) And it must be admitted that, among a people with whom a community of interests is the most common form of property, it is expedient that some security, likely to be efficient, should exist, to protect families against the consequences, in any of their members, of vicious extravagance. In assigning the punishment for gaming, Menu is silent as to its excluding from inheritance.(4)—It must be confessed that, with every benefit of distinction and explanation, for want of well-defined cases, judicially ascertained, and authentically reported, much, in enforcing the greater part of the law comprehended in the whole of this chapter, must be left to (what

(1) 3 Dig. 299, contr.—Post, p. 224.

(2) 3 Dig. 298. 300.

(3) Wright, on Tenures, p. 44, citing Zasius, in Usus Feud. 91. and Crag. de Jur. Feud. 362.

(4) Menu, ch. IX. 221 to 228.

should in judicature be provided against as much as possible) the delicate discretion of the judge. In the meantime, the following recapitulation and remarks will be received with the respect due to the authority from whence they proceed. "In regard to the causes of dis-
" inheritance, discussed in the Digest, b. v. ch. 5. sect. 1.,
" corresponding with the 5th ch. of Jimuta Vahana, and
" the 10th sect. ch. 2. of the Mitacshara, I am not aware,
" that any can be said to have been abrogated, or to be
" obsolete. At the same time, I do not think any of our
" Courts would go into proof of one of the brethren
" being addicted to vice,(1) or profusion, or of being
" guilty of neglect of obsequies, and duty toward an-
" cestors. But expulsion from caste, leprosy, and similar
" diseases, natural deformity from birth, neutral sex, un-
" lawful birth, resulting from an uncanonical marriage,
" would doubtlessly now exclude; and, I apprehend, it
" would be to be so adjudged in our Adawluts. That
" the causes of disinheritance, most foreign to our ideas,
" are still operative, according to the notions of their law
" among the natives, I conclude from some cases that
" came before me, when I presided in Zilla Courts. I
" will mention but one, which occurred at Benares, at
" the suit of a nephew against his uncle, to exclude him
" from inherited property, on the ground of his having
" neglected his grandmother's obsequies. He defended
" himself, by pleading a pilgrimage to *Gaya*, where he

(1) See 1 Bombay R. p. 144;—where a Will by a Father, partially disinheriting one of his Sons, on the ground of vicious conduct, was sustained on appeal.

" alleged he had performed them. His plea, joined with " assurances of his attending to his filial duty in this re- " spect in future, was admitted; and the claim to dis- " inherit him, disallowed."(1)

It remains to consider one case, that may be said to be, with reference to personal delinquency, *instar omnium*—occurring in every enumeration on the subject, as a cause of exclusion, namely;—*degradation*, or the case of the *outcaste*.(2) Accompanied with certain ceremonies, its effect is, to exclude him from all social intercourse, to suspend in him every civil function, to disqualify him for all the offices, and all the charities of life;—he is to be deserted by his connexions, who are from the moment of the sentence attaching upon him, to " desist from speaking to him, from sitting in his " company, from delivering to him any inherited, or " other property, and from every civil or usual attention, " as inviting him on the first day of the year, or the " like."(3)—So that a man under these circumstances, might as well be dead; which, indeed, the Hindu law considers him to be, directing libations to be offered to *Manes*, as though he were naturally so.(4) This system of privations, mortifying as it must be, was enforced under the ancient law, by denouncing a similar fate to

(1) Per Mr. Colebrooke, in MSS. penes me.

(2) Menu, IX. 201.—Jim. Vah. ch. V. § 3.
Mit. on Inh. ch. II. sect. x. § 1, 2.
Sancha and Lichita, 3 Dig. 300.—Nareda, Id. 303.
Devala, Id. 304.—Brahma Purana, Id. 312, 313.
Vishnu, Id. 316.—Baudhayana, Id. 316.

(3) Menu, ch. XI. p. 185.—Id. IX. 238.

(4) Menu. ch. XI. 183, 184.—Post, Append. to ch. VII. p. 261.—C.

any one, by whose means they were endeavoured to be eluded;(1) but this severity was moderated at the beginning of the present age, in which it is said "the sinner "alone bears his guilt;"(2) the law deeming so seriously of non-intercourse, that if one who ought to associate at meals with another, refuses to do so, without sufficient cause, he is punishable.(3) And, in the Bombay reports, there is an instance of an action of damages, for a malicious expulsion from caste.(4) The analogy between degradation by the Hindu law, and excommunication, as it prevailed formerly among us, holds, not merely in the general nature and effect of the proceeding, but in the peculiar circumstance of the one and the other being twofold. As, with us, there was the less, and the greater excommunication, so, of offences considered with reference to their occasioning exclusion from inheritance among the Hindoos, they may also be regarded in a twofold point of view. This we learn from a case that was before the Sudder Dewanny Adawlut of Bengal, in 1814, in which the official Pundits, having been referred to, distinguished between "those which involve partial, and temporary de-"gradation, and those which are followed by loss of "caste;"—observing that "in the former state, that of "partial degradation, when the offence which occasions "it is expiated, the impediment to succession is removed; "but in the latter, where the degradation is complete,

(1) Menu, ch. XI. 181, 182.
(2) Parasara, General Note, at the end of Menu, p. 363.
(3) Post, Append. to ch. VII. p. 265.—C.
(4) Durmashund *v.* Goolashund, 1 Bomb. R. p. 11. 35; And Vid. Post, Append. to ch. VII. p. 267.—E.

"although the sinfulness of the offence may be removed "by expiatory penance, yet the impediment to succession "still remains; because a person finally excluded from his "tribe must ever continue to be an outcaste."(1) In the case alluded to, the party in question having been guilty of a series of profligate and abandoned conduct, having "been shamefully addicted to spirituous liquors; having "been in the habit of associating and eating with persons "of the lowest description, and most infamous character; "having wantonly attacked and wounded several people "at different times; having openly cohabited with a "woman of the Mahomedan persuasion; and having set "fire to the dwelling-house of his adoptive mother, "whom he had more than once attempted to destroy by "other means," the Pundits declared, that "of all the "offences proved to have been committed by *Sheanauth*, "one only, namely, that of cohabiting with a Mahomedan "woman, was of such a nature, as to subject him to the "penalty of expulsion from his tribe, *irrevocably*;"—and of this opinion was the Court. The power to degrade is, in the first instance, with the *caste* themselves, assembled for the purpose; from whose sentence, if not acquiesced in, there lay an appeal to the King's Courts.(2) In the case that has been cited, the question arose incidentally, upon a claim of inheritance; and that case shews that the power amounts to a species of *censorship*, applicable to

(1) Sheanauth Rai *v.* Mussummant Dayamyee; Beng. Rep. 1814, p. 434. 1 Dig. 279. 288. And see the Cases on the subject, in 1 Bombay R. p. 11 and 35.

(2) Post, Append. to ch. VII. p. 267.—E.

the morals of the people, in instances to which the law, strictly speaking, would not perhaps otherwise extend. The sentence can be inflicted only for offences committed by the delinquent in his existing state; (1) and, where the offence is of an inferior nature, to justify it, it must have been repeated. (2) What distinguishes degradation from other causes of exclusion is, that it extends its effects to the son, who is involved in his father's forfeiture, if born subsequent to the act occasioning it. (3) Born before, he is entitled to inherit, and takes, as though his father were dead. (4) Whereas, in every other instance of exclusion, the son, if not actually in the same predicament with his father, succeeds, maintaining him; the same right extending as far as the great-grandson. (5) And, with regard to the father, or delinquent himself, where the exclusion from inheriting is not for natural defects, the cause must have arisen, previous to the division, or descent of the property; if it do not occur till after, the succession is not divested by it. (6) Hence, adultery in the wife during coverture, bars her right of inheritance;(7)—divesting it also, after it has vested;—the Hindu widow resembling, in this respect, the con-

(1) 3 Dig. 312.
(2) 3 Dig. 304.
(3) Devala, 3 Dig. 304.—Vishnu, Id. 316.
Daya Crama Sangraha, ch. III. vii. 152.
(4) 3 Dig. 321.
(5) Jim. Vah. ch. V. § 19.—Mit. on Inh. ch. II. sect. x. § 3.
3 Dig. 304. 324.—Daya Crama Sangraha, ch. III. vii. 13.
(6) Mit. on Inh. ch. II. sect. x. 6. note.—3 Dig. 479.
(7) Mit. on Inh. ch. II. sect. i. 30, 39.
Vrihaspati, 4.—3 Dig. 458.—*Vriddha* Menu, Id. 478.
Beng. Rep. ante 1805, p. 64.
Post, Append. to ch. VII. p. 269.—S. 270.—C

dition of ours in most instances of copyhold dower, and holding it, like her, *dum casta fuerit* only; according to an opinion of great respectability, that for loss of caste, unexpiated by penance, and unredeemed by atonement, it is forfeited. (1) In general, the law of disqualification applies alike to both sexes. (2)

It appearing, then, that the incapacity to inherit, except in the instance of the *outcaste*, is personal merely; that one excluded may be said, in every case, to be entitled to be maintained; (3) and that, in most, it is in his power, at any time, to restore himself to his rights;— whatever may be thought of the wisdom of some of these provisions, it cannot be said that they are universally destitute of justice, or, in any instance, totally devoid of humanity. Nor, in comparing this part of the law with our own, ought we to forget, that the latter has made none, for preventing the absolute disinheriting of children by will.

It will appear, in a subsequent chapter, (4) that, on entry into either of the two religious orders, the *devotee* (like the professed monk with us before the Reformation) becomes *civiliter mortuus;* and the next heir succeeds, as though he were naturally deceased. (5) And, as the *devotee* himself, abdicating secular concerns, is incapacitated from inheriting, so is the religious *pretender*,

(1) Post, Append. to ch. VII. p. 272. C.—See also 3 Dig. 479.
(2) Mit. on Inh. II. sect. x. 8.
(3) Post, ch. VIII. p. 174.
(4) Post, ch. IX. p. 186.
(5) Menu, ch. IX. 211, 212.
Vasishta, Mit. on Inh. ch. II. sect. x. § 3.
3 Dig. 3. 7.—Catyayana, Id. 326.

and the eventual *apostate*. Under the former term may be included *hypocrites* and *impostors*, used synonymously for those who, usurping sacred marks, practise austerities with an interested design. (1)

The remaining cause of exclusion to be noticed is, an *incompetent marriage;* that is, where the husband and wife are descended from the same *stock*. Such a marriage being incongruous, the issue of it cannot inherit, excepting among Sudras. And the consequence is the same, where the marriage has not been according to the order of *class*. (2)

The heir, or heirs, under no disability, having succeeded to the inheritance, it is next to be seen, to what *charges* this is liable.

(1) Devala, 3 Dig. 304. 315.
Menu, ch. IV. 200. 211.—Id. ch. VII. 154.
Jim. Vah. ch. V. 14.—3 Dig. 327.

(2) Ante, p. 38.

CHAP. VIII.

CHARGES ON THE INHERITANCE.

THE charges, to which the inheritance is liable, are of three kinds. First, debts, and other obligations, in the nature of legacies. Secondly, certain specific duties to be provided for out of it, where it has descended to a single heir, and out of the common fund, where it has vested by survivorship, in undivided parceners. Thirdly, maintenance, of all requiring, and entitled to it.

1. The first charge to be noticed is the payment of debts; an obligation which the Hindu law inculcates upon the heir, as of importance to the peace of the deceased, equally with the performance of his funeral ceremonies;—the two together constituting the true consideration for inheritance. (1) The most general position respecting it is, that debts follow the assets into whosesoever hands they come;(2) the obligation to pay attaching, not upon the death only of the ancestor, but on his becoming an anchoret, or having been so long absent from home, as to let in a presumption of death. (3) But to be thus binding, a debt must have been incurred on a good consideration. This excludes such as have arisen

(1) Ante, p. 128.—Menu, ch. XI. 66.
1 Dig. 267.—266, note.

(2) Yajnyawalcya, 1 Dig. 270, and many subsequent pages.
Post, Append. to ch. VIII. p. 280. 282.

(3) Vishnu, 1 Dig. 266, et seq.

from gaming, or the purchase of spirituous liquors(1) except in privileged times, when excesses may be indulged.(2) Debts due for tolls and fines are also excepted; (3) the reason of which may be, that they are to be regarded as ready money payments, for which credit will have been given, at the risk of him by whom they ought to have been received. And, where the consideration of a debt may have been such, as in its nature to charge the common fund, as for the nuptials of any of the family, the expense attending them must have been reasonable, according to the usage and means of the family; beyond which, if carried to excess, he, who so imprudently contracted it will be alone liable, unless it have been adopted by the rest.( ) Contracted fairly, for the use of the family, by whatsoever member of it, it binds the whole. (5) Much as is said every where of the religious tie the son is under, to pay the debts of his ancestor, it seems settled at Bengal, that it has no legal force, independent of assets. (6) But, to the Southward, the doctrine of the Mitacshara, supported by the Madhavya, and Chandrica, is said to render the payment of the father's debts with interest, and the grandfather's without interest, independent of assets, a legal, as well as

(1) 2 Bombay R. p. 200.—Id. p. 203, note.
Post, Append. to ch. XII. p. 456.

(2) Menu, ch. VIII. 159.—1 Dig. 296. 307.
Vrihaspati, 1 Dig. 304, 305. 311.

(3) 1 Dig. 304. 307. 309.

(4) 1 Dig. 294, 295.

(5) Menu, ch. VII. 166.—1 Dig. 282, et seq. and 290.
Beng. Rep. Cause 12. for 1817. p. 607.
Post, Append. to ch. XII. p. 458.

(6) 1 Dig. 320.—Note to Id. 266.

sacred obligation.(1)—In the discharge of it, a priority also is prescribed, suitable, in one respect, to the genius of the law: depending, first, on *class;* next, upon the *time* when they have been severally contracted. Where creditors are of different classes, the Brahmin is to be preferred in payment; and others according to the order of their class;—while, among creditors of the same class, the payment is to be in the order, in which the respective debts due to them were contracted. But, as there is no fraction of a day, where debts due have been contracted on the same day, the payment is to be *pari passu*, by a proportionate distribution of the assets; excluding altogether the creditor who, possessing a pledge, has trusted to it for his recovery.(2) To these rules, there is an exception in favour of one, whoever he may be, and whensoever the debt due to him was contracted, with reference to assets produced by his particular loan; upon which he has a sort of *lien*, being entitled to be paid out of them in the first instance; and in preference to any other claimant.(3) The course for the payment of debts, on partition, may be either by disposing of a sufficient part of the property for the purpose, and thus paying them off at once; or, by apportioning them among the parceners, according to their respective shares;—an arrangement, which, to be binding upon creditors, would require their assent.(4) Modified as the details of Hindu law are, every where,

(1) 1 Dig. 270.—Post. Append. to ch. VIII. p. 274 to 279.
(2) 1 Dig. 376 to 379.
(3) Catyayana, 1 Dig. 380.
(4) Jim. Vah. ch. I. 48.—Post, Append. to ch. VIII. p. 283.

by local usage and practice, how far the whole of the ancient provisions for the payment of debts are at present applicable, must be left to the discretion of Courts, exercising jurisdiction, within particular limits. What remains to be adduced on the subject will be more properly reserved for the chapter on Contracts.(1)

Connected with the above duty, is the discharge of obligations, resting on the intention of the deceased, sufficiently manifested; since, though nothing occurs in the Hindu law expressly in favour of the testamentary power, as exercised under other codes, it provides distinctly for the performance of promises by the ancestor in his lifetime, to take effect after his death; and, to this extent, a "*friendly gift*," as it is called, not being an *idle* one, and far less one founded on an *immoral* consideration, being available in law as a charge upon heirs, may be assimilated to a legacy.(2) But, according to the doctrine of the Mitacshara, such a gift, referring to property held in common, in order to be good, must have had the consent of the deceased's coparceners; (3) — as, if made by a widow, it must have had that of her guardian, and next heirs.(4) Like a legacy, also, it is liable to lapse by the death of the donee in the lifetime of the donor, with this peculiarity however, that, if once vested in the donee,

(1) Post, ch. XII. p. 276.

(2) Menu, ch. VIII. 159.—Jim. Vah. ch. I. § 47.
Catyayana, 1 Dig. 299.—2 Id. 96.—3 Id. 389.
1 Dig. 247. 333 to 305.—Post, p. 258. et seq.—and Append. to ch. XI. p. 426. 435.—C.

(3) Mit. on Inh. ch. I. sect. i. § 30.

(4) Post, Append. to ch. XI. p. 444. 445.—S. contra.

it is partible among his co-heirs, if he have any;—if, never vesting in him, in consequence of his death during the life of the donor, it descends to his heir, the latter takes it, not liable to be shared.(1) And as, with us, necessary funeral expenses are allowed the executor, previous to all other debts and charges, to this place may be referred the duty enjoined by Vrihaspati to the Hindu heir, of setting apart a portion of the inheritance, to defray, on behalf of the deceased, his monthly, six monthly, and annual obsequies;—on the ground of wealth being intended for spiritual benefit, as well as for temporal enjoyment.(2)

2. Not less obligatory upon the heirs is the charge for the *initiation* of the uninitiated, and the *marriage* of the unmarried members of the family. Initiation involves a succession of religious rites, attended with more or less of expense; commencing with purification, and terminating in marriage. They are ten in number; of which marriage is the only one competent to females and Sudras; the rest being confined to males, of the three superior classes.(3) The duty of initiating attaches to those who have themselves been initiated; and the provision for it is to be made before partition, out of the common stock.(4) It has been already intimated,(5) that charges of this nature, to

(1) 3 Dig. 389.

(2) Jim. Vah. ch. XI. sect. vi. 13.—Vrihaspati, 3 Dig. 532. Post, Append. to ch. VIII. p. 285.

(3) Note to Mit. on Inh. ch. I. sect. vii. 3. Note to Datt. Mim. sect. iv. 23.—Note to 3 Dig. 104.—Id. 94. Vrihaspati, 3 Dig. 101.

(4) Mit. on Inh. ch. I. sect. vii. 3, 4.—3 Dig. 96. 98. 102. 1 Bombay R. p. 418.

(5) Ante, p. 167.

be available against the inheritance, must be reasonable; though this is seldom attended to.—They regard brothers and sisters only, not extending to collaterals.(1)

3. The general claims of the dependant members of the family come lastly to be considered; of which the first to be noticed is that of the *widow*, to maintenance, where she does not take as heir. In awarding it to her, what she possesses as *Stridhana*, or her peculiar property, is to be matter of account; the utmost that she can claim being, to have it made up to her, equal to what would be a son's share, in the event of partition.(2)

The right of the widow, being established, it remains to be seen, in what this charge on the inheritance consists, and how it is to be provided for.(3) It may be supplied by an assignment of land, or an allowance of money; in either case proportioned to her support, and that of those dependant upon her, including the performance of charities, and the discharge of religious obligations; and this always, with a reference to the amount of the property, so as, at the utmost, (as has been said,) not to exceed a son's, or other parcener's share. In whatever way the provision is made, care should be taken to have it secured. The manner of doing this is discretionary, there being no special law, directory herein. Whether, in estimating her *Stridhana* on the occasion, her clothes, ornaments, and the like, are to be taken into account, or only such articles of her property as are produc-

(1) Post, Append. to ch. VIII. p. 286. 288. 312.—C.

(2) Post, Append. to ch. VIII. p. 290. 292. 296—Vid. tamen Id. 297. E.

(3) Post, Append. to ch. VIII. p. 299 to 304.

tive of income to her, or conducive to her subsistence, does not distinctly appear; though the restricting the account to the latter would seem to be reasonable, considering the object.(1) An opinion, that her maintenance should be independant of her peculiar property, is unsupported.(2) As chastity is a condition of her inheriting, on failure of male issue,(3) so, it would seem that, by a want of it, she forfeits her right to maintenance;(4) as, under similar circumstances, does the wife her *alimony*, by the ecclesiastical law of England; leaving it a question, however, in the case of the Hindoo, whether, notwithstanding, she be not entitled, (as *outcastes* generally are,) to food and raiment.(4) Where her husband's property proves deficient, the duty of providing for her is cast upon his relations; and, failing them, upon her own; an obligation that attaches, though she should have wasted what was assigned to her for the purpose; giving colour to the law, requiring her to live with them, that they may watch and control her conduct.(5) The *grandmother* also, forming a part of the family, is alike entitled to maintenance;(6) as are also the stepmothers.(7) *Married sisters* are con-

(1) Post, Append. to ch. VIII. p. 306.—E.

(2) Append. p. 379.—E. to ch. VIII. p. 307.

(3) Ante, ch. VI. p. 135.

(4) Post, Append. to ch. II. p. 39. and ch. VII. p. 309.—C. It has been suggested, that the consequence of unchastity by a Hindu female attaches only where it is of a special nature; as by the wife, or widow, of a preceptor, with his pupil, or with a man of an inferior caste.—But, quere, What authority is there for so restricting it?

(5) Mit. on Inh. ch. II. sect. i. 7. 37.—Id. ect. x. 14, 15.
Jim. Vah. ch. V. 19.—3 Dig. 324. 479.
Post, ch. X. p. 247.

(6) 3 Dig. 12. 27. 30. 90.

(7) Daya Crama Sangraha, ch. VII. 3.—But see Id. 7, 8.

sidered as provided for.[1] *Unmarried* ones, maintainable out of the family property till marriage, are, upon partition, a charge upon it, to the extent, as is commonly said, of a quarter of a share;[2] an allotment explained by various authorities, including the Chandrica and Madhavya, as meaning a sufficiency only for the expenses of their marriage; and *widowed* ones, not otherwise provided for, are entitled to be maintained.[3] The difficulty attending the apportionment to a sister, of an aliquot part of a brother's share, is removed, by shewing, that the allotment intended is not a fourth to each sister, to be deducted from the share of each brother; (which, according to the state of particular families would, it is admitted, render the partition, as between brothers and sisters, quite disproportionate,) but a participation, out of the whole, equivalent to the fourth of a brother's share, without regard to the number of brothers.[4] Where the widow succeeds as heir, she takes, subject among other things, to defray the education and nuptials of an unmarried daughter;[5]—as also to maintain those whom the deceased was bound to support.

But neither are these all the charges to which the inheritance is subject, before it is distributed. It has been seen that, in the Sudra class, *illegitimate* sons succeed as

(1) Post. Append. to ch. VIII. p. 311.—C.
(2) Mit on Inh. ch. I. sect. vii. 5, 6.
Jim. Vah. note to ch. XI. sect. i. 20.
Menu, ch. IX. 118.—3 Dig. 90, et seq.
Post, Append. to ch. VIII. p. 311. 313.—C.
(3) 3 Dig. 92, et seq.
(4) Mit. on Inh. ch. I. sect. vii. 5, et seq.
(5) Jim. Vah. ch. XI. sect. i. § 63. 66.
3 Dig. 489.—1 Id. p. 321.—3 Id. 461.

heirs, wholly, or partially, according to the state of the family in that respect;(1) and, in all the classes, as with us, it is the duty of the parent to maintain issue of this description; an obligation that attaches to the survivors, and is to be provided for upon partition.(2) The mothers of such children also have the like claim, which the providence of the law, not content with securing for them, in all ordinary cases, has been careful to charge upon heirless property, in the hands of the king.(3) The claim of another class of dependants remains to be noticed,—namely, that numerous one, the subject of the preceding chapter, excluded, some by their destiny, others by various disabilities, from inheritance; but all, by the humane provision of the law, entitled, out of it, to an abundant maintenance;(4)—all, unless the *outcaste*, and his issue subsequently born, are to be excepted.(5) According to Menu, the substituted heir is to provide it for life, without stint, to the best of his power, subject to penalties and consequences, that have been already stated. (6) With regard to the *outcaste* and his issue, authorities differ; (7)—upon which it is observable, however, that he is not excepted by Menu, and that he is admitted by Yajnyawalcya. It is true, the measure is restricted to

(1) Ante, p. 68. 132.
(2) Mit. on Inh. ch. I. sect. xii. § 3.
Ante, p. 69.
(3) Mit. on Inh. ch. II. sect. i. § 7. 28.
Jim. Vah. ch. XI. sect. i. § 48. 52.
(4) Menu, ch. IX. 202.—3 Dig. 318.
(5) Jim. Vah. ch. V. 11.
(6) Ante, p. 67.—Menu, ch. IX. 202.
(7) Menu, ch. IX. 202.—Mit. on Inh. ch. II. sect. x. 1.
Jim. Vah., citing Devala, and Baudhayana, ch. V. 11, 12.

"food and raiment;" (1)—to which, if the *outcaste* be admissible, it would seem difficult to exclude the adulterous widow. Of persons disqualified to inherit, their childless wives, continuing chaste, are moreover to be provided for; as are also the maintenance and nuptials of their unmarried daughters. So anxiously careful has the Hindu law been, that there shall exist no final distress in families, while means exist to prevent it, even in instances of the most undeserving.

Thus has been seen, in this, and the two preceding chapters, how inheritance vests, on the death of the owner, subject to disabilities, and charges. But it results from the interest that sons, under the Hindu law, possess by birth in the family property, that the owner willing, or under particular circumstances independant of him, it may, as it were, be anticipated, by a division among them in his life. Or, if left to descend, descending among them, as it must, in common, they may themselves divide it. This leads to the consideration of *Partition;* an extensive title in the Hindu law, upon which it is proposed to treat in the next chapter.

(1) Mit. on Inh. ch. II. sect. x. 5.

CHAP. IX.

ON PARTITION.

As partition, in the life of the parent, is, in modern times, of but rare occurrence, it has been thought by some, that any account of the law of it here might reasonably be dispensed with; and this the rather, that it can scarcely come in question in the King's Courts; restricted as these are generally, in administering native law, to matters of Inheritance and Contract. But, to suppress this branch of it would be to exhibit the subject in a mutilated form; beside that partition in the one case may serve sometimes, by analogy, to illustrate, or explain it, in the other. It is proposed therefore to give here a summary of both, in their natural order: first, as it may take place in the life of the father; and, secondly, after his death, among his representatives; premising, to the detail of the latter branch, some account of the state of a Hindu family, as it exists on the descent of the property, while it remains yet undivided.

Partition, in its most general sense, comprehending, as well the division of the paternal property during the life of the father, as that which usually takes place, at some period or other, among coheirs, is the adjusting, by distribution, the possession of different

parties to a pre-existing right;([1]) as the divesting of exclusive rights in specific portions of property, and re-vesting a common one over the whole, is implied in re-union.([2]) Whether it occur during the life, or not till after the death of the owner,—in either case, it is founded on a claim of succession, originating in birth: inchoate, and contingent during the life of the father; and, generally speaking, certain and indefeasible, upon his death.([3]) The contingency upon which it depends during his life, is of two kinds; either his will, that it should so take place; or the extinction of his own right in it, in point of law, by means remaining to be stated; in which latter case, the right of the sons becomes absolute, the same as if he were dead.([4]) Upon these considerations, the writers on Hindu law discuss it under the head of inheritance; with which it is so far connected, that it follows of course, at the option of parties, after the succession has once vested by the death of the prior owner, and of which it is a sort of anticipation, when it takes place in his lifetime.

The inchoate right, that has been alluded to, renders the sons, as has been seen, in some sort, co-proprietors with the father of the family property;([5]) to the extent

(1) Jim. Vah. ch. XI. sect. i. 26.
Mit. on Inh. ch. I. sect. i. 4, note.

(2) Mit. on Inh. ch. I. sect. i. 4, and note.
Jim. Vah. note to ch. XII. 1.

(3) Ante, p. 169.—Post, Append. to ch. XI. p. 427.

(4) Gautama: cited in Mit. on Inh. ch. I. sect. i. 23.
Compared with note to Jim. Vah. ch. I. § 19.—Also Id. § 31.

(5) Ante, p. 15, et seq.—2 Dig. 150.
Post, Append. to ch. IX. p. 315.—(.

of giving them, under particular circumstances, claims upon it in his life, which, consistently with the spirit and intention of the law, it is not in his power altogether to bar. Vesting in them however by birth,(1) they attach more upon that part of it that has been inherited by him, than upon what he may have himself acquired; the title to property descended from ancestors being considered to be in him and them, so far the same,(2) that, upon partition by him taking place, the law regulates the distribution; whereas, with regard to the rest of what he possesses, it leaves it more at his discretion. This distinction, with whatever other peculiarity belongs to this part of the subject, will appear on investigating it under the following heads, viz.—1. *When* partition takes place in the life of the father. 2. *Among whom.* 3. *How.*

1. Upon the first point, various opinions exist, according to which the number of periods is differently assigned, by different writers, for the attaching of the claim in question in sons. Most of them include, and all imply, the natural demise of the father, as one; but this is an occasion of inheritance, not necessarily of partition, as has been properly remarked.(3) Omitting this, therefore, as one, the simplest, and perhaps the most tenable position

(1) Mit. on Inh. ch. I. sect. i. § 23. 27.

(2) Jim. Vah. ch. II. § 15, et seq.
Mit. on Inh. ch. I. sect. ii. § 6.
Id. sect. v. § 3.—Vishnu, 2 Dig. 538.

(3) Viramitrodaya. Note to Mit. on Inh. ch. I. sect. ii. § 7.

on the subject is, that independently of the case of his natural death, it attaches *with* his consent; or *without* it, under some one or other of the circumstances hereafter mentioned, subject to the remarks accompanying their enumeration. Whatever might be the case among the Hebrews, no Hindoo can, according to the law, as it prevails in the Bengal provinces, under any circumstances, say to his father, in the peremptory language of the prodigal, "Father, give me the portion of goods that falleth to me." The father may abdicate in favour of one, or of all, according to the limits imposed upon him by the law, if he thinks proper; but, with the exception of two cases, partition among the Hindoos, in the lifetime of the father, whether of ancestral, or acquired property, would seem to be at his will, not at the option of his sons;(1) the excepted cases being, that of his civil death, *by entering into a religious order*, and that of *degradation*, working a forfeiture of civil rights.(2) And, even with regard to these, it is not the will of the sons that operates, but the law; which, in favour of the title by birth, casts upon them the succession, before the arrival of the time for its regular devolution, by the natural death of the parent. A text indeed of Menu(3) (already cited) is referred to, as shewing, that, of ancestral property, belonging to the

(1) Menu, IX. 104.—Sancha and Lichita, 2 Dig. 533. 536.
Nareda.—Vysa, 3 Dig. 35.—Gautama, 2 Dig. 535.
Baudhayana, Id. 536.—Jim. Vah. ch. II. § 8.
Mit. on Inh. ch. I. sect. ii.
Post, Append. to ch. IX. p. 319 to 323.

(2) Menu, IX. 209.

(3) Mit. on Inh. ch. I. sect v. § 11.

father, the sons may at their pleasure exact a division of him, however reluctant; and it is true, (as has been already intimated,) that their claim upon property descended is stronger than upon what has been otherwise acquired; but the inference, drawn in the Mitacshara, is at variance with the current of authorities, including Menu himself; (1) whose obvious meaning, in the text referred to, is simply, that ancestral property *recovered*, without the use of the patrimony, classes, upon partition, with property *acquired*. Not to mention, that the text in question is differently rendered in the translation we have of the "Institutes," by Sir William Jones; (2) in which it has nothing to do with partition by the father, but regards partition among brothers after his death. Moreover, Jagannatha, in his Digest, virtually negatives the inference deduced from it, and other correspondent texts, which he examines; concluding that, if it be against the father's inclination, partition, even of wealth inherited from the grandfather, shall not be made. (3) It is said farther in the Digest, (4) that, of patrimony inherited, a partition may be obtained from the father by application to the king, in case of oppression by a step-mother; but, as to the kind and degree that may suffice to warrant such an interference, the author is silent. The position is not

(1) Menu, IX. 104.

(2) Menu, ch. IX. 209.—But, according to Mr. Colebrooke, the version by Sir W. J. is from the context, and not literal. See note to 3 Dig. 34.

(3) 3 Dig. 45.

(4) 3 Dig. 47.

supported by any thing to be found in the *Daya Bhaga* of Jimuta Vahana, or in the *Mitacshara;* and the compiler's authority is not, of itself, sufficient to establish one of so questionable a nature. Other periods indicated, are, the extinction of the father's passions, or the arrival of the time for the mother to be past child-bearing, the sisters also being married; when, according to Nareda and others, partition of ancestral property may be exacted by the sons, in opposition to the father.(1) The marriage of sisters is confessedly mentioned as a circumstance only that should precede, but not as conducing in any degree to accelerate, partition.(2) With respect to the doctrine, as regarding the period when an increase of family is no longer to be expected, it does not appear to be generally adopted, except where this state of things may have determined the father to retire from the world and its concerns altogether; a measure that is admitted, on all hands, to constitute a ground for their claims being realized.(3) But, though the expiration of the time for child-bearing may not enable them to enforce a partition, which the father is not prepared to concede, (4) it is, in regard to ancestral property, held by the founder of the Eastern school of law, supported by his commentator Sricrishna, as well as by Raghunandana, that it cannot take place

(1) Jim. Vah. ch. I. § 32. 34.
Mit. on Inh. ch. I. sect. ii. § 7.—3 Dig. 48.

(2) Jim. Vah. ch. I. § 47.—3 Dig. 52.

(3) Jim. Vah. ch. I. § 39, and note.

(4) Jim. Vah. ch. II. 111.

even *with* the father's consent, while the wife continues capable of being a mother; it being required that, to the will of the father to make it, there be joined the mother's incapacity to bear more children,—on the ground, that future issue, have, by birth, a special interest in property of the father, that has descended.(1) The possibility, however, of its so happening, has led to a provision in that event, for after-born sons;(2) different opinions existing, whether it be to be supplied by the father, or by the brothers who have received their shares. Upon which it is said, that, where pregnancy is apparent at the time, either the partition should wait, or a share be set apart, to abide the event: but that, if it were then neither manifest, nor apprehended, in such case, should a son *who was at the time in the womb*, be born after, he should obtain his share from his brothers, by contribution; while a *subsequently begotten* one shall have recourse only to the remaining property of the father; succeeding to the whole exclusively, or dividing it with such of the brothers as may have become re-united to the common parent; any acquisition by a re-united father, through means of his individual wealth, or personal exertions, belonging exclusively to the son, born after partition, and not to

(1) Nareda, 2 Dig. 113.—3 Id. 50.
Jim. Vah. ch. I. § 45.—Id. ch. II. § 1, and note. § 7. 33, and note to § 34.
Sricrishna, note to Id. ch. I. § 50.
Balambhatta, note to Mit. on Inh. ch. I. sect. ii. § 7.
Post, Append. to ch. IX. p. 324.—S.

(2) Menu, ch. IX. 216.—3 Dig. 50.—Id. 434 to 459.
Mit. on Inh. ch. I. sect. vi. 2. 16.
Daya Crama Sangraha, ch. V. 10, et seq.

him in common with another re-united. And, where there is no after-born issue, the sons, who had received their shares, take by inheritance what their parents leave.(1) The objection arising from the competency of the wife to continue bearing children, applies equally to a second, whom the father may have, at one and the same time; the providence of the law having regard to the interests of sons generally, so they be sons of the same father.(2) Upon this principle it is said, that where sons apply to the king for partition, he must first inquire whether the mother be past child-bearing;(3) and the same reservation is inculcated, where it attaches upon the father retiring with his wife, as a devotee, to the wilderness.(4) Adverting to the various opinions that have been entertained on the question, the practical difference among them (says an eminent commentator) regards chiefly the cases of vice and profligacy, with lasting disease, and consequent disqualification, and incapacity; subjoining, however, that, without consent of the head of the family, it is not in such cases allowed by the prevalent authorities of Bengal, unless the vice or disease be such, as to induce degradation from caste.(5) If, in any case, as in that of the protracted absence of the father from home,(6) there should arise a question of *management*,

(1) Mit. on Inh. ch. I. sect. vi. 16.
(2) Notes to Jim. Vah. ch. I. 45.—ch. II. 1.
(3) 3 Dig. 51.—Ante, p. 180.
(4) Note to Jim. Vah. ch. I. 39.
(5) Mr. Colebrooke, MS. *penes me*.
(6) Harita, 2 Dig. 527.
Bengal Rep. Ante 1805, p. 96.
Post, Append. ch. IX. p. 316.—C. 317. T.

defeasible on his return, or recovery, whichever of the sons is the most conversant with business, is the proper one to interfere on the occasion; not primogeniture,(1) but capacity being, for this purpose, considered as affording the best rule in a family; though, other things being equal, the elder has undoubtedly the preferable title,(2) —the same as, where the management of the property is to be provided for, among co-heirs.(3)

In the provinces dependant on the government of Madras, and elsewhere in the peninsula, the right of the son to exact partition of ancestral property, independant of the will of the father, appears authorized, but not without the existence of circumstances to warrant the measure; such as the father having become superannuated, and the mother past child-bearing; the sisters also married.(4) And there are two occasions, upon either of which, wherever the Hindu law prevails, dominion may be transferred from the father in his life, without his consent, whether the property claimed by the sons to be divided be ancestral, or acquired. These are, voluntary *devotion*, by which the father is considered as having renounced it, and *degradation* from caste, by which it is forfeited. Upon these it will be proper for a moment to dwell; taking *degradation* first.

It is to be remembered that, by our own law, as old as

(1) Post, Append. to ch. IX. p. 321. E. 326. 331. 333. 335.—C. 342.—E.

(2) Post, p. 193.—Menu, ch. IX. 105, et seq.
2 Dig. 528.—Sancha and Lichita, cited in Jim. Vah. ch. I. 42.
2 Dig. 533.—Jim. Vah. ch. I. 37. 43.
Nareda, 2 Dig. 532.—Post, Append. to ch. IX. p. 326.—C.

(3) Post, p. 199.

(4) Mit. on Inh. ch. I. sect. ii. 7.—Id. v. 5.

the time of the Saxons, property is, with us, forfeited by crime; as, by the feudal law also, as introduced among us at the Conquest, it escheats for the same cause, on attainder. Degradation from caste, by the Hindu law, answers to attainder by ours;(1) except that, under the former, instead of either the king, or the lord taking, the succession, upon the delinquency of the owner being ascertained by sentence, vests in his heirs; as it does indeed with us after a time, under the law of escheats, where the superior efficacy of that of forfeiture to the crown does not intervene. Expiation obviates its effects, if made in time: but it comes too late to revest the property, after partition has taken place.(2) It is unnecessary to pursue this subject further here, having been already treated of, in a former chapter.(3)

2. Another undoubted one, so far as it still subsists, is, what we should call his *entry into religion;* that is, his assumption of the one, or other, of two religious orders, by which a Hindoo is accounted (as were monks, with us, before the Reformation) dead in law; the consequence also being the same, that his heirs take his estate.(4) They constitute the third and fourth stages, in the progressive advancement of the Hindoo, from birth to death; the first being that of a *student;* the second,

(1) Jim. Vah. ch. I. 34. 41. 44.
Note to Mit. on Inh. ch. I. sect. ii. 7.
Devala, 2 Dig. 522.—Nareda, Id. 523.

(2) Menu, ch. XI. 228.—1 Dig. 270. 288. 312.
2 Dig. 525, et seq.

(3) Ch. VII. p. 160.

(4) Harita, 2 Dig. 536.—Jim. Vah. ch. II. § 57.
Menu, ch. IV. 1.—Id. VI. i. 33. 34.
Sidh Narain v. Futeh Narain; Beng. Rep. ante 1805, p. 36.

that of the married man, or *householder.* (1) In entering upon the first of the two in question, viz. that of *hermit, (Vanaprasta,)* for which the appointed age is fifty, (2) he may repair to the lonely wood, accompanied by his wife, "if (says Menu) *she choose* "*to attend him.*" (3) And as, therefore, in such event, a prospect of future issue may still exist, while it continues to do so, partition will be premature, so far at least as regards property inherited, according to the authorities that have been already referred to. (4) The next is that of *Anchoret, (Sanyasi,* or *Yati,)* when there remains nothing to prevent it from immediately taking place. The nature and condition of these orders is fully explained by Menu, who has devoted a chapter to the subject; (5) and if, as would appear, the order of Anchoret was left at the beginning of the present *(Cali)* age subsisting, when that of the Hermit is said to have been abrogated, (6) it must have been upon the ground that *retirement to the wilderness* might, without material prejudice to the interests of life, be left open, adverting

(1) Menu, VI. 87.—Note 60 to Datt. Mim. p. 22.—Ante, p. 35. Note (1).

(2) Jim. Vah. ch. I. § 39.

(3) Menu, VI. 3.

(4) Of persons of this description in former times, the forests and wilds of the country were full, as appears by the beautiful drama of Sacontala; where, having abdicated the common intercourse of life, among the diversity of courts known to the Hindu law, one was specially provided for this ascetic community, called *aranya sabha;* from *aranya*, forest, and *sabha*, a court.—See ante, Pref. p. XV.—letter B. post, p. 319. and Append. to ch. VII. p. 267.

(5) Ch. VI.

(6) Nareda and Smriti.—See general note at end of the translation of Menu, p. 364, 365.

to Menu's description of the frame of the Anchoret, as, by this time, "infested by age and sorrow, the seat of "malady, harassed with pains; such a mansion, in "short, of the vital soul, as the occupier may (be ex-"pected to) be ready always cheerfully to quit."(1) In either case, whether of the *outcaste*, or the *devotee*, partition attaches only upon property possessed by him at the time, not upon what may subsequently devolve, or be acquired. ()

2. *Among whom it takes place.*—The immediate objects of partition by the father are, his sons. They alone can enforce it, in cases in which it is exigible by law. It is at their instance, and on their account only, that it is ever conceded by him. Under the ancient law, subsidiary ones participated, but not equally, with the legally begotten; as does still the son *given* in adoption, as well as any other competent in the present age to be adopted. (3) Where illegitimate issue would inherit, in case of the death of their putative father, they will have a claim to share on partition in his life; and they are, under other circumstances, entitled to be provided for, to the extent of maintenance. (4) On partition also, as well as in inheritance, sons, as far as great-grandsons, share,

(1) Menu, ch. VI. 17.

(2) Vachespati Bhattacharya, 2 Dig. 525.

(3) 3 Dig. 176. 287. 290.

(4) Mit. on Inh. ch. I. sect. xii.
Daya Crama Sangraha, ch. VI. 32.
Mahabharata, 3 Dig. 115.—Id. 140.—Ante, .69. 173.
Post, Append. to ch. III. p. 65 to 71.

jure representationis. (1) And, if one of the sons, absent at the time of partition in a foreign country, die leaving issue, their right survives to them as far as the seventh generation; and, on their appearing, the brothers, who remained at home, and divided, (or their representatives,) must, to that extent, answer a claim out of their several shares. (2) The term generally mentioned, as constituting for this purpose length of absence, is twenty years; (3) though it is said in one place that, if no intelligence be received during twelve years, concerning a man who has travelled to a foreign country, the law requires his son to perform obsequies for him, presuming his death. (4) In determining what is, for this purpose, to be considered as a foreign country, various circumstances are to be attended to; such as difference of language, the intervention of a mountain or great river, and distance, as combined with one or more of the leading points; countries being accounted distant, whence intelligence is not received in ten nights. (5) The right of *after-born* sons has been already mentioned. (6) A *minor's* share should be secured for him. (7) The result of much discussion as to the interest that the *wife* has in partition by, or in the life of the husband, is, that it is incidental; it not

(1) 3 Dig. 7. 68. 65.
Daya Crama Sangraha, ch. I. sect. i. 3.
(2) Vrihaspati, 3 Dig. 84. 440.
Jim. Vah. ch. VIII.
Post, Append. to ch. IX p. 327. 396.
(3) 1 Dig. 266—269.
(4) 1 Dig. 278.
(5) *Vrihat* Menu, and Vrihaspati, 2 Dig. 29.
(6) Ante, p. 182.
(7) Post, Append. to ch. IX. p. 362.—C.

being competent to her to claim it in her own right.(1) Being admitted to participate, she shares equally with the sons, account being taken of such separate property as she may possess, derived from, or through her husband;(2) and allowing her, according to some authorities, certain appropriate deductions of furniture, ornaments, and the like.(3) Where she does not participate, she is to depend upon the reservation to be made by her husband, for himself, and the remaining members of his family; which, with reference to property acquired by him, may be to any extent that he may deem expedient.(4) The allotment of a share to her, where it takes place, does not imply separation: so far from it, that the text, declaring partition not to obtain between a wife and her lord,(5) has been in modern times construed as importing a denial of their dis-union, as a thing altogether incompetent.(6) And accordingly, whether she take her several share on the occasion, or a reserved portion out of the property retained, for that and other purposes, by her husband, the law supposes the conjugal intercourse to remain, after partition among sons. Her share, if assigned to her, being in the nature of alimony, and dif-

(1) Apastamba, 3 Dig. 27.—Id. 422—427.

(2) Jim. Vah. ch. III. 31.—Mit. on Inh. ch. I. sect. ii. 8, 9.
Id. sect. vii. 1.—Post, ch. VIII. p. 171.
Yajnyawalcya, 3 Dig. 11, et seq.—Id. 19, et seq.—1 Dig. 231.
Daya Crama Sangraha, ch. VI. 22—27.

(3) Apastamba, 3 Dig. 26.
Mit. on Inh. ch. I. sect. ii. 10, and sect. iii. 6.

(4) 3 Dig. 30.

(5) Apastamba, 3 Dig. 27.

(6) 3 Dig. 426, 427.

fering in point of title from her *Stridhana*, or what is emphatically called the *peculiar property of a woman*, is resumeable, if necessary, by her husband.(1) Where there are several wives, they share equally.(2) *Wives of the paternal grandfather* have the same claim with the father's.(3) *Daughters* take nothing, as of right, during their father's life.(4)

3. As to the *mode of partition*, and the *assignment of shares*. It may be made openly in the presence of arbitrators; privately, by adjustment;(5) and a third method of ascertaining a separate title is, by casting of lots;(6) upon which it may be remarked, that the above are precisely three, out of the four, enumerated by our Littleton, as the modes of partition among sisters, (coparceners,) at the English common law; the fourth being only a modification of the one by private agreement,—when, it having been settled that the eldest shall make it, she chooses last, according to an established rule, *Cujus est divisio, alterius est electio.* Of what antiquity in the East is partition by lot, appears from its having been the way, by which the land of Canaan was to be

(1) 3 Dig. 22—27.—Id. 72. 427.
Jim. Vah. ch. II. § 57.

(2) Yajnyawalcya, 3 Dig. 11. 18, et seq.
Mit. on Inh. ch. I. sect. ii. 8, 9.

(3) Vyasa, 3 Dig. 12.—Id. 24.

(4) Mit. on Inh. ch. I. sect. vii. § 14.
Nareda, 3 Dig. 48.—Id. 52.

(5) Sancha and Lichita, 2 Dig. 536.

(6) 2 Dig. 505. 518—Jim. Vah. ch. I. § 8, note.

divided among the tribes, and people of Israel.(1) Previous however to partition, debts must be provided for, by such means as may be agreed at the time; since, taking place in the life of the father, it must be looked upon as an anticipated descent of his property; and, as the property of one deceased may be pursued by his creditors, into whatsoever hands it comes,(2) it follows that the sons, among whom it is divided, must, at all events, be liable, to the extent of the shares assigned them; under the general responsibility of the descendant for the debt of his ancestor, subject to any arrangement for payment, to which the creditors have been parties.(3) But, for a debt incurred by a disunited father, an after-born son is exclusively liable, unless it was contracted, not on his own account alone, but for the benefit of the family, subsequently to re-union; in which case it is eventually a charge, as well upon the re-united parceners, as upon sons born after partition.(4) Where there are outstanding debts, both of father and grandfather, with assets of each, they may be distributed; analogous to the practice in our Court of Chancery, of marshalling the assets.(5) And here it may be

(1) Numb. ch. XXVI. v. 54, 55. XXXIII. 54; and Josh. ch. XVIII. 10. As a matter of curiosity, the following is, according to Littleton, the method in England of partition by *lot*. Partition being made, each separate part of the land is written on a little scroll, which is covered with wax in form of a ball, so that the scroll cannot be seen; when all the balls are put into a hat, to be kept in the hands of an indifferent person; after which, the eldest daughter draws first, and the rest according to their seniority.—*Allnatt*, p. 15.

(2) Note to 1 Dig. 266.

(3) Jim. Vah. ch. I. § 48.—Daya Crama Sangraha, ch. VIII. 26.

(4) Id. ch. V. 18, 19.

3 Dig. 74.

observed, that the son, living with the father, is liable for a debt contracted by him for the common concern, upon the latter becoming afflicted with an incurable disease, the same as though he were dead; making it, by consequence, reasonable that, in such case, there should be in the son a right of interference with the family property.(1) With respect to other charges upon the property, forming, with that of debt, the subject of a distinct chapter,(2) it need only be remarked here, that the father can retain for them; and that if, through degradation from caste, or otherwise, this should not be competent, they will remain to be provided for by the sons, as among brothers after the death of their father, out of the common stock.(3)

Partition being to be made, by the ancient law, whether it were by the father among his sons, or subsequently among brothers, the practice was, to begin with deductions of a twentieth to the eldest, a fortieth to the middlemost, and an eightieth to the youngest.(4) Different constructions occur, as to which was to be considered as the middlemost; one being, that it included all the intermediate ones, between the eldest and youngest;(5) another, that it meant the next after the eldest, those born subsequently being, according to this strange idea, all comprehended under the term, youngest.(6) Upon the former construction, a fortieth was given

(1) Catyayana, 1 Dig. 277.
Post, Append. to ch. VIII. p. 277. and to ch. IX. 326.
(2) Ante, ch. VIII.
(3) Ante, p. 166.
(4) Menu, ch. IX. 112.—Mit. on Inh. ch. I. sect. iii. § 3.
(5) Menu, ch. IX. 113.—2 Dig. 550.
(6) Sricrishna, note to Jim. Vah. ch. II. § 37.

to each; unless they happened to be deficient in virtue, in which case, they had only a fortieth among them.(1) The eldest had moreover a claim, not only to the best chattel, but, upon partition among brothers, to the best apartment of the house, the rest being distributable according to the pretensions of each.(2) But, to entitle him to these privileges, extraordinary merit was required to be combined with primogeniture, otherwise some trifle only was to be given him, to distinguish him as eldest.(3) The rules concerning these deductions varying, their diversity is endeavoured to be reconciled by the supposition of relative, and superior good qualities—a criterion of title admitted to depend upon reasoning, too subtle to be allowed much influence in the determination of civil rights.(4) Altogether obsolete as the pretension is, upon partition among brothers, and optional in any case on the part of the father in his lifetime, while he is restricted from acceding to it, where the property is hereditary, (5) the law upon it has become a matter of mere curiosity.(6) Disregarding, therefore, all distinctions of the above kind, the general rule is, that, as among the sons, it must be equal.(7) It may, indeed, be so far partial, that (as in the instance of the prodigal son in the celebrated parable) any

(1) 2 Dig. 559.
(2) 2 Dig. 558.
(3) Menu, ch. IX. 214, 215.—2 Dig. 551.
(4) 2 Dig. 548—587.—3 Id. 182.—Ante, p. 99. 141.
(5) Byroochund Rai *v.* Russoomunee; Beng. Rep. ante 1805, p. 29.
Id. p. 64.—Post, Append. to ch. IX. p. 382.
Mit. on Inh. ch. I. sect. ii. § 1. 6.—Id. sect. iii. 4.
2 Dig. 565. 574. 587.—Aditya Purana, 3.
See general note, at the end of the translation of Menu, p. 364.
(6) Bengal Rep. Case 6, for 1818, p. 630.
(7) Post, Append. to ch. IX. p. 316 and 320.—C.

one son may, in exclusion of the rest, be its sole object, the property of the father with regard to the rest, and they also, remaining as before;(1) it being certain that such one, upon whatever ground he separates, can only receive his due share; the rule alluded to (which is alike binding according to the doctrine of every school) being, that, as to such parts of it as have been inherited by the father, whether real or personal, land or moveables, the division must be strictly equal; while, with respect to that which is of his own acquisition, his sons co-operating, or not, it must be virtually so.(2) For, with regard to the latter, of which the shares are more in the discretion of the father, he is not at liberty to make distinctions upon improper grounds; as for instance, on behalf of the issue of a favourite wife, which was prohibited by the Jewish, as it is by the Hindu law;(3) preferences, as well as exclusions, requiring to be justified by circumstances, not being permitted to be indulged through caprice;(4)—just as, among the Romans, it was not competent to the parent to disinherit his child totally, without assigning sufficient reason for an act so contrary to nature: whereas, on the distribution of that which is ancestral, the Hindu father has no discretion at all.(5) And here it may be remem-

(1) Daya Crama Sangraha, ch. VII. 13.
(2) Menu, ch. IX. 215.
Jim. Vah. ch. II. 20. 50. 76.—86, note.
Daya Crama Sangraha, ch. VI. 19, 20.
Bhowannychurn B. *v.* Heirs of Ramkaunt B.; Beng. Rep. 1816, p. 562.
2 Dig. 544.—Post, Append. to ch. IX. p. 317.—D.
(3) Deut. ch. XXI. v. 16, 17.—Nareda, 2 Dig. 541.—3 Id. 2.
Daya Crama Sangraha, ch. VI. 11—15.
(4) Jim. Vab. ch. II. 74. 83, et seq.—Mit. on Inh. ch. I. sect. . 14.
Catyayana, 2 Dig. 540.—3 Id. 2.
(5) Jim. Vah. ch. II. 50.

bered, that, whatever may have been acquired by him, *using the patrimony for the purpose,* is construed as forming a part of what has descended; while, of that which is properly ancestral, any portions that, having been lost during the time of the ancestor, have been since recovered by his successor, *without the use of the patrimony,* are looked upon as acquired; and such augmentations are liable to be classed and treated accordingly on a partition.(1) So fixed are these principles, as applicable to the different sorts of property, that, if violated, and the departure from them not acquiesced in at the time, the proceeding may be disputed; the sons' joint ownership with the father being said to consist in the power of claiming partition, (*i. e.* as it must be understood, where it is by law claimable,) and in that of resisting an unequal one.(2) Where a share is not desired by a son, it may be effectually waved by his acceptance of a trifle in satisfaction, upon the principle of *quisque potest renunciare juri pro se introducto;* his heirs being bound by his consent.(3) But, without renunciation, it may be still claimed.(4) Nor is it necessary, where the partition is general, that it should attach upon the whole of the property; a part only may be distributed, keeping what remains for future division, or to descend in a course of inheritance.(5) With regard to the indivisibility of par-

(1) Ante, ch. I p. 16.

(2) Mit. on Inh. ch. I. sect. ii. 14.—3 Dig. 43. 45. 49. 67. Post, Append. to ch. IX. p. 417. 419.—I.

(3) Menu, ch. IX. 207.—Mit. on Inh. ch. I. sect. ii. § 11, 12. Yajnyawalcya, 3 Dig. 65.

(4) 3 Dig. 68.

(5) 2 Dig. 527.—Post, Append. to ch. IX. p. 392.—C.

ticular things, and the divisibility of others, but in a special way, the distinctions and differences involve a detail, which, as it would be tedious to repeat, so will it be best reserved for what follows upon partition *among co-heirs*,(1) where questions of the kind are more likely to arise, than upon partition by the father, which, in the nature of the thing, can comparatively speaking, so rarely occur; it being moreover declared, that the precepts concerning partition among brothers are to be observed as between a father and his sons, due attention being paid to circumstances, and in the absence of express texts of law.(2)

The shares of the sons being thus ordained to be, in general, equal, the father has a right to two for himself out of the ancestral property, the law, as to what he may otherwise have acquired, having left him free to part with as much, or as little of it in his life, as he pleases; retaining for himself, and the rest of his family, not receiving shares, whatever he may think proper;(3) with liberty, in case of indigence, to resume, what he may have so divided;(4) as the Roman law (observes a learned writer(5)) indulged to every one who laid himself under a gratuitous obligation, the benefit of a competence, (*beneficium competentiæ,)* by which he might retain for himself

(1) Post, p. 211.
(2) 2 Dig. 125.
(3) Jim. Vah. ch. II. § 35, and note.—Id. 47. 55. 75, et seq.
Post, Append. to ch. IX. p. 324.—S.
Nareda, 3 Dig. p. 43.
Vrihasp. Id. p. 44.
Sancha and Lichita, 2 Dig. 555.
(4) Nareda, 2 Dig. 536.
(5) Colebrooke on Obligations, p. 248.

so much as would be necessary for his subsistence, if, previous to the fulfilment of the obligation, he happened to be reduced to want.

Jagannatha, citing the Pracasa's exposition of a text of Menu, says, "Should any one of undivided brothers, "through laziness or knavery, make no exertion for gain, "not striving to improve the existing stock, and acquire "farther wealth, by agriculture, or the like, he may be "debarred from his share of that which has been added "by the rest of the brethren; subject to a trifle being "given him for his maintenance; and without prejudice "to his claim for a share of the original stock;"—a reasonable provision surely as against a *drone!* But the Southern Pundits deny this; they insist, that to the right of sharing there is no such exception; but that all participate equally, including such as may have done nothing toward improving the common stock; not admitting the power of driving

Ignavum fucos pecus a præsepibus—

And, for this, referring to the Mitacshara, they think the text of Menu (already cited) to be declaratory of the only case, in which a parcener may be excluded from his share, namely, with his consent.(1)

It remains to treat of partition among co-heirs;—previous to which, it will be consonant to advert to the state of a Hindu family, on the descent of the paternal property, and while it remains undivided.

(1) Mit. on Inh. ch. I. sect. iv. 31.—Menu, ch. IX. 207. Post, p. 220.

Wherever a plurality of sons exists, the inheritance descends to them, as *Coparceners*, making together but one heir; like the descent with us, by the common law, to females, or by particular custom, as *gavelkind*, to all the males in equal degree. To this descendibility of estates, by the Hindu law, to all the sons in common, there appears to have been ever, in point of fact, an exception in the case of the crown; as it is with us, at this day, in the same case, where there are only females to inherit. The exception, arising from the nature of the thing, is noticed by Menu, who speaks of a dying king "having duly "committed his kingdom to his son;"(1) a course, which Jagannatha refers to usage rather than to law.(2) Upon the same principle of usage, stands, with respect to many of the great Zemindaries of Bengal, and other parts of India, at this day, the exclusive succession of the eldest son,(3) or of a *Jobrai* (Yava-Raja, *juvenis rex*),—a young prince, associated to the empire, as coadjutor to the king, and his designated representative.(4) With these exceptions, the rule of coparcenary prevails; in investigating which, it is necessary to observe, that the deceased may have left, not only more sons than one, but brothers, as well as a widow or widows, and daughters, together with other dependants; and such sons and brothers may

(1) Menu, ch. IX. 323.
Post, Append. to ch. IX. p. 328.

(2) 2 Dig. 121, 122. See also, Id. p. 118. 188. and 3 Id. 97.

(3) Beemlah Dibeh v. Goculneth; Beng. Rep. ante 1805, p. 32.
Koonwur Bodh Sing v. Sconath Singh; Id. 1813, p. 415.
Post, p. 208. 236. and Append. to ch. XI. p. 447.

(4) Ramgunga Deo v. Doorgamunee Jobrai; Beng. Rep. 1809, p. 00.
Urjun Manie Thakoor v Ramgunga Deo; Id. 1814, p. 469.
Post, Append. to ch. IV. p. 167.

have their wives and children respectively; the whole having constituted, in his lifetime, (not so many coparceners indeed, in the proper sense of the term, but) an *undivided family*. Or, supposing him to have been a single man, with collateral relations only, their descendants and connexions, all living together in coparcenary, his death makes no difference in this respect among the survivors. If undivided while he lived, till a division takes place among them, they still continue so, in point of law, howsoever appearances may indicate a different state.

In the property thus descended, so long as they remain undivided, the family possesses a community of interest;(1) though, in order to avoid confusion, reason and law alike suggest the expediency of adopting some one member of it to manage its concerns. To this confidence, the claim is with the eldest, but it is subject to character, and the general sense of the coparceners, without a concurrence of which no express or implied pretension of the kind can have any validity.(2) This management regards the dealings and transactions that are carried on under it, professedly on behalf of the family;(3) the obligatory force of which becomes of importance, alike to the members in general, and to creditors. In this capacity, as manager, all his acts and

(1) Prima societas in ipso conjugio est; proxima in liberis; deinde, una domus; communia omnia. 1 Cic. Offic. lib. i. 17. Oxford edit. 4to.

(2) Jim. Vah. ch. I. 36, 37.—2 Dig. 533.—Ante, p. 184. Post, Append. to ch. VI. p. 252.—And Infra, p. 264.

(3) Jim. Vah. ch. III. sect. i. 15.—Vyasa, 2 Dig. 189. Prannath Das v. Calishunker G.; Bengal Rep. ante 1805, p. 49.

disbursements, to be of validity, must be for the general good, if not for the immediate and indispensable maintenance of the whole;—for objects, chargeable upon the common stock, including works of piety, which it concerns all should not go unperformed;(1) with this difference, that where his acts have been for the support of the family, the charge is *in its nature* binding upon the joint property, though the remedy may eventually be against him only by whom it was incurred, so acting;(2) whereas, if in the course of trade, or for charitable purposes, in order to its being so, it must have had *the consent* of the rest, express or implied.(3) Accordingly, it imports creditors to take notice, whether the family, with which they are about to deal or contract, be divided, or undivided; and, if the latter, at their peril, to see that the transaction be one, by which the rest of the co-heirs will be concluded; since, otherwise, he only, with whom it has been entered into, will be answerable for it, and not the common stock. Such seems to be the result of the decisions referred to below:(4) of which those at Bengal rest upon the highest living authority in Hindu law,—that of Mr. Colebrooke; who, upon this point, and with reference to a case at Madras, upon which he was consulted, held, "that the consent of the sharers, express "or implied, is indispensable to a valid alienation of "joint property, beyond the share of the actual alienor"

(1) Mit. on Inh. ch. I. sect. i. 28, 29.—Post, Append. to ch. IX. p. 339.
(2) Bengal. R. Cause 12, for 1817, p. 607.
Post, Append. to ch. IX. p. 336—338.
(3) Post, Append. to ch. IX. p. 342.
(4) Prannath Das v. Calishunker Ghoosal; Beng. Rep. ante 1805, p. 51.
Sheva Dass v. Bishonath Dobee; Id. p. 46.

—observing, in the course of his opinion, "that the only "doubt which the subtlety of Hindu reasoning might "raise, would be, whether it be maintainable even for "his own, the property being undivided."(1) Such may be the construction of a passage in the Mitacshara, on the ground of co-ordinate property. (2) But, where each parcener is considered to have, vested in him, during the copartnership, a several, though unascertained right, as is the case where the authority of Jimuta Vahana prevails, (3) it is clear that there may be an assignment before partition; the alienee becoming a sort of tenant in common with the other parceners, admissible, as such, to his distributive share, upon a partition taking place;(4) and, even with respect to an alienation of the whole, it would be good for the alienor's share; though, for his attempt to dispose of more, unwarranted, he would be liable to penal consequences. (5) The eminent person alluded to, was careful at the same time to admit the force of circumstances, under which, consent in these cases may be presumed; especially when the management of the property supposes a power of disposal; and, generally, when the acts, or even silence of the other sharers, may have given him a credit, and the alienee

(1) Notes of Cases at Madras, vol. ii. p. 79. Ed. 1827.
Post, Append. to ch. IX. p. 343. 348.

(2) Mit. on Inh. ch. I. sect. i. 30.—2 Dig. 519.

(3) Sricrishna, note to Jim. Vah. ch. II. 28.
2 Dig. 104.
Daya Crama Sangraha, ch. XI. 2, 3. 7.

(4) 2 Dig. 104.

(5) 2 Dig. 105.
Post, Append. to ch. IX. p. 350.—E.
Anunchund Rai *v.* Kishen Mohun Bunoja; Beng. Rep. 1805, p. 32.
Rajbulubh Bhooyan *v.* Mt. Buneta De; Id. ante 1805, p. 48.

had no notice.(1) It is obvious that, in a multitude of cases here contemplated, fraud and collusion, on the part of the co-heirs, would be imputable; and, wherever this is manifest, the consequence is so likewise; once ascertained, it never is to succeed.(2) But, wherever they appear to have been unconscious of a transaction militating against their interests, the policy of the law would be, to exact of the person so dealing with the manager, or other member of the family thus abusing his power, the most extreme caution; (3) for, though the want of notice may be always pleaded on the part of the alienee, yet it is to be so pleaded as a circumstance only, and not in bar; nor, even as a circumstance, is it to be attended to but with much reserve; open, as it must always be, to argument, and leading to endless uncertainty, as well as to perjury;—so much better is it, that the rights of subjects should depend upon certain and fixed principles of law, rather than upon constructive inferences, by which justice is but too often misled, and loose and pernicious practices encouraged, to the subversion of property! In favour of a *bona fide* alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due, out of the share of him, with whom he had dealt; and, for this purpose, a court would be warranted in enforcing a partition.(4) The

(1) Post, Append. to ch. IX. p. 344.
(2) Menu, ch. VIII. 165.
(3) Post, Append. to ch. IX. p. 348.—C.
(4) Post, Append. to ch. IX. p. 349.—C.
And Append. to ch. XI. 433.

necessity of inquiry, on the part of persons dealing with a family that may be undivided, will be naturally greater, where *minors* happen to be concerned; who, in general, will not be bound but by necessary acts, or such as are evidently for their benefit; the jealousy, in their favour, of the Hindu, corresponding with that of the English law.

II. Having thus adverted to the condition of the family undivided, partition among co-heirs comes next to be considered; in investigating which, the following points are material; viz. 1. The right. 2. The property to be divided. 3. How the division takes place. 4. The proof, where it is disputed. To which will be added, 5. Matters subsequent. And, 6. General observations concerning.

1. As to the *right*, it is far from commensurate with the interest existing in the property; numbers being eventually concerned, who cannot demand a division. Thus, the females of the family have a right to be maintained, and provided for out of it, as will have been seen in the last chapter. — But, since a wife cannot claim partition as against her husband, nor a daughter a share upon its taking place in the life of the father,(1) so neither can the one, or the other, generally, call for it after his death. This can be done by those alone, who are considered as *heirs;* in contradistinction to those, who have a claim only to be *maintained*,—of which latter

(1) Ante, p. 188. 190.

description are the widow or widows of the deceased, leaving at his death male issue;—the principle being, that the right is co-ordinate with the gift of funeral cakes.(1) It may take place with reference to one only, leaving the rest as they were before, undivided; or, it may be general, all consenting. According to Menu, it has been thought to be prohibited during the life of the mother; his words being, that, "after the death of the "father and mother, the brothers may divide the paternal "and maternal estate."(2) But the author of the *Smriti Chandrica* has explained the meaning to be, that the death of the one, and of the other, has reference distributively to their respective property; so that the partition of the father's may be made, living the mother, and that of the mother's, while the father is yet in existence; there being no reason to wait the demise of both, in order to divide what has belonged to either; neither having ownership in the other's property, where there are children. Jimuta Vahana, indeed, denies the lawfulness of distribution, while the mother survives,(3) but his opinion is construed by his commentator Sricrishna, and others, as importing only that such partition is wrong, not that it is null.(4) And the result of a careful examination by Mr. Colebrooke, of every material passage applicable to the point, was, that a division, living the mother, is competent throughout every province, that of

(1) Devala, 3 Dig. 10.

(2) Menu, ch. IX. 104.—Daya Crama Sangraha, ch. VIII. 1.

(3) Jim. Vah. ch. III. sect. i. 13. —3 Dig. 78.

(4) Note to Jim. Vah. ch. III. sect. i. 1.

Bengal excepted; where the prohibition, after all, is considered, by the best authorities, to be merely ethical; so that a division in breach of it is not even there invalid.(1) But, where the deceased has left *several* widows, with sons, more or fewer, by each: in such case, if the number by each be *equal*, in order to avoid the trouble of a more detailed distribution, the allotment may be to the mothers, leaving it to them to sub-divide among the sons, instead of dividing to the sons in the first instance; a mode of division called *Patni-bhaga*, or division by wives, in contradistinction to *Puttra-bhaga*, or the division by sons.(2) In this there appears nothing unreasonable; but the principle of this mode being, that the division to the wives is always to be an equal one, its effect becomes very different, where the number of sons by each *varies*. As, if one wife has one son, another three, and a third six, and each wife takes a third of the property, it is evident that the shares of the sons, all by the same father, will be very different. So unnatural a mode of division, therefore, is allowed only among Sudras; nor, among them, but where there is a *custom* for it, which must of course be strictly proved;(3) though it is said to prevail in the Southern territories of India, as much as did formerly the custom of *gavelkind* in Kent; thus, to a certain extent, but still in the Sudra class only, superseding the law of the *Sas*-.

(1) MSS. penes me.—And see Post, Append. to ch. VI. p. 252.

(2) 2 Dig 572. 575.—3 Id. 110.

(3) Sumrun Singh *v.* Khedun Singh, Beng. Rep. 1814, p. 443; where the custom in question is called *Koolachar*.

tras; and, to this opinion, the frequency with which references of the kind appear to have been made, in the courts of the Company in the Peninsula, seems to give countenance.(1) The same text of Menu, last cited, is also referred to, as inconsistent with the right of a single co-heir to call for partition, since it speaks of "the *brothers* being assembled for the purpose;"—but the construction has been different, and the right is distinctly affirmed by Jimuta Vahana.(2) It seems equally clear, that it may be enforced for the benefit of a *minor*, as where his coparceners are committing waste. In such a case, his guardian, or, in default of one, any relation not interested, would be competent to institute a suit for the purpose;(3) by which his share, being separated, must be secured for him till he come of age; otherwise, as against him, a partition would be void.(4) Upon the same footing, in this respect, with minors, are *absentees*, residing in a foreign country;(5) whose consent, at the time, not being attainable, partition may proceed without it, the law enjoining the preservation of their respective shares, till the one arrive at majority, and the other returns; and this, in the case of the latter, to the extent of the *seventh* in descent, the right of parceners, remaining at home, being lost by dispossession beyond

(1) Post, Append to ch. IX. p. 351, to 357.
And Append. to ch. IV. p. 167.
(2) Jim. Vah. ch. III. sect. i. § 16.
Post, Append. to ch. IX. p. 359.—C.
(3) Id. Append. to ch. IX. p. 360. 361.
(4) Id. Append to ch. IX. p. 361.
(5) Ante, p. 188.

the *fourth*.(1) Admitting the consent of the mother, where living, not to be universally necessary, in those parts of India where it may be dispensed with, if a widow of a deceased co-heir happen to be pregnant at the time of his death, or be supposed to be so, either partition should wait, or a share should be set aside, to abide the contingency of her having an after-born son; failing which, it reverts, and is distributable, subject to the maintenance of the widow. Or, should such a birth take place subsequent, though not apprehended at the time, so as to have suggested the reservation of a share, an allotment must be made, by contribution among the parceners who have divided, making due allowances; as in case of partition in the life of the father. *Grandsons*, claiming by representation, distribution in their case must be settled through their deceased fathers; the aggregate sons of each being entitled *per stirpem*, not to an equality individually with their uncles and cousins.(2) And, as on partition by a father, so among co-heirs, any one, not wanting his share, may wave it by acceptance of a trifle, such acceptance operating as an estoppel against his claim ever after.(3)

2. *As to the property to be divided.*—Upon partition in the life of the father, there is, as has appeared, a material

(1) Jim. Vah. ch. VIII.
Vrihaspati, 3 Dig. 440.—Id. 448.—Id. 10.
Daya Crama Sangraha, ch. X.
Ante, p. 188. and Post, Append. to ch. IX. p. 327. 396.

(2) Mit. on Inh. ch. I. sect. v. 2.—Catyayana, 2.—3 Dig. 7.—Id. 82.

(3) Menu, ch. IX. 207.—Ante, p. 195.

difference between the ancestral property, that has descended, and what has been since acquired; the distribution of the latter being subject, in some degree, to the will and discretion of the father;(1) but no such distinction exists upon partition among co-heirs, whose right attaches alike on both kinds, and among whom the division of every thing must be equal. Things destined to religious uses, indeed, remain in common; except that the *idols* of the family are, by some texts, assigned to the eldest son, deductions in favour of whom are, by the modern law, in general, obsolete.(2) Such is the general rule, founded on the supposition of the property not inherited having been acquired by the joint labour of all, or under circumstances rendering it common. But this not being always the case, and other considerations intervening to modify the right, this part of the subject will be best discussed, by considering, α. What things are *impartible*, with the reasons rendering them so: β. Such as are *partible* indeed, but in a *special manner*.

α. As to things vesting in an individual of a family, in exclusion of the other members, and consequently impartible, the instance of *Regalities*, and of *Zemindaries*, (standing upon the same ground) has been already noticed;(3) of which it has been thought, however, that

(1) Ante, p. 194.

(2) Jim. Vah. ch. III. sect. ii. 27.
Mit. on Inh. ch. I. sect. ii. 1. 6.—Id. sect. iii. 4.
Neelkaunt Raj v. Munee Chowdraen; Beng. Rep. ante 1805, p. 63.
Post, Append. to ch. IX. p. 382.
See a contest for an object of this nature, in Bombay R., p. 181, where the revenue of the Idol was computed at Rs. 100,000 per annum.

(3) Ante, p. 198.—Post, Append. to ch. IX. p. 328.

it is the *ruling power* only that is not subject to division; while the effects and private estate of a sovereign, like those of any ordinary individual, are in common, and distributable among all his sons.(1) These seem to be the only instances of the kind; the exception arising from the nature of the thing, sanctioned by custom. It may be convenient, however, to advert here to some other subjects, upon which doubts have been entertained, upon no solid foundation. Such, upon a supposed analogy to a *corody*, as well as on the ground that partition of them among a number, for whose maintenance they cannot adequately provide, would defeat their object, are the *Mara Vurtanah*, *Bazar Vurtanah*, and other dues accruing to the *conicopoly* of a village; which, though agreed to be heritable, have been denied to be divisible.(2) But a *corody*, being the grant of an annuity assigned upon some particular fund,(3) if made to one of an undivided family and his heirs, with nothing in it to control the operation of the law, would, upon the death of the grantee, leaving sons, descend in common, and be divisible among them on partition.(4) It is the same with a village granted in *Srotryum*,() —a favourable tenure, conferred occasionally by government, in consideration of the individual merits of the grantee. Supposing the grant to be exclusive, it would not be partible

(1) Post, Append. to ch. IX. p. 329.—E.

(2) Id. Append. to ch. IX. p. 363.—E.

(3) 2 Dig. 163.

(4) Catyayana, 3 Dig. 375.

(5) Post, Append. to ch. IX. p. 365.—E.

among collaterals;(1) and consequently, upon the death of the *Srotryumdar*, leaving sons, their uncles not sharing in the inheritance, it would descend (not to the eldest merely, but) to all the sons in common. And, as to this leading to endless divisibility, the objection, being inherent, cannot be helped, unless obviated by the terms of the grant, importing a particular limitation; since, otherwise, the law must prevail. Nor is the case of the *conicopoly* distinguishable from that of the various offices attached to the pagodas, and other religious establishments of the natives, the rights of Brahmins attendant upon funerals, and the like; which, however some of them may be disposable by regulating the periods of their enjoyment, as they are in general hereditary, so are they likewise common and divisible;(2) as are also assignments to individuals of the government share of the produce of a portion of land, called *Jaghires*.(3) But lands endowed for religious purposes are not inheritable, and consequently not divisible, though the management of them may be so.(4) Impartibility results also from *appropriation;* upon which ground, as well as to obviate the inference from their having been obtained at the expense of the joint estate, it has been thought expedient (it seems) expressly to declare, that *wives* continue to belong to their respective husbands, upon, and after partition.

(1) Purtaub Bahauder Sing *v.* Tilukdhasse Sing; Beng. Rep. 1805, p. 101.

(2) 3 Dig. 375.—Post, Append. to ch. IX. p. 368.
Mt. Rajoo *v.* Mt. Buddun; Beng. Rep. 1812, p. 327.
Kalachund Chuckurbuttee *v.* J. Chuckurbuttee; Id. 1809, p. 211.

(3) Post, Append. to ch. IX. p. 329.—E.

(4) Elder widow of Raja Chutter Sein *c.* Younger do. of do. Id. 1807, p. 103.
Ante, p. 151.

Such is the explanation given of "women," in the several texts enumerating things that are exempt. They are said to respect the wives of the co-heirs, the female slaves of the family being clearly partible.(1) Upon this ground rests the exemption of the clothes and jewels of the different members of the family, whether male or female;(2) but it is confined to such as have been usually worn; habitual wear (says Jagannatha) being considered as a mode of acquisition.(3) So, by the English law, under similar circumstances, it is matter of reference, in the Court of Chancery, to the Master, to inquire what jewels or other things, a lady is entitled to, for her *paraphernalia;* and that the same be retained by, or delivered to her. But, by the Hindu law, clothes of value, as court-dresses and the like, worn only on particular occasions, in which all are interested, remain, on partition, as before, for common use, unless sold; in which case, the proceeds are distributable.(4) And, even of common apparel, if one happen to have much more than the rest, the difference must be adjusted, excessive disparity being in all things forbidden.(5) The same principle of appropriation extends to *slave-girls;* with respect to which, where there are in a family several, of whom any of the members have been in the habit of employing one in particular to rub his limbs, or for whatever other purpose, his property

(1) Jim. Vah. ch. VI. sect. ii. 23, 24.—3 Dig. 382.
(2) Menu, ch. IX. 219.—3 Dig. 372.
Jim. Vah. ch. VI. sect. ii. 14.
Mit. on Inh. ch. I. sect. iv. 17. 19.
(3) Daya Crama Sangraha, ch. IV. sect. ii. 13.
(4) 3 Dig. 376, et seq.—Id. 381, et seq.
(5) 3 Dig. 373.—Post, Append. to ch. IX. p. 370.

in her may be confirmed, when they come to divide; without regard to any accidental difference between her and the others, as to age, strength, or other qualities; provided that, upon the whole, the partition be equal.(1) If there be but one, it can only be done by *compensation*.(2) And, where there being but one, there have existed no such appropriation, she may be distributed by computation of time and work *(alternis vicibus)*, like any thing else physically indivisible,(3) and which, therefore, where many are concerned, can only be enjoyed by turns, or in common, subject to specific distribution by means of sale.(4) With respect to women of the kind alluded to, that have belonged specially to the father, or other ancestor, they are not to be distributed, but maintained, as long as they continue to conduct themselves irreproachably.(5) And, as to other things that were his, in a peculiar sense, such as clothes and ornaments, his bed, with its furniture, as well as his conveyance and the like, "after perfuming them with fragrant "drugs, and wreaths of flowers," they are directed to be given to the person partaking of food at his obsequies.(6) Any other particular article, as a horse, or carriage, may be exempt on the same ground; and, analogous to what will be stated hereafter, with respect to acquisitions by

(1) Menu, IX. 219.—Gautama, 3 Dig. 380.—Id. 374.
Jim. Vah. ch. VI. sect. ii. § 24.
Mit. on Inh. ch. I. sect. iv. § 23.
(2) 3 Dig. 384.
(3) 2 Dig. 505.—Vrihaspati, 3 Id. 379.
(4) Jim. Vah. ch. I. 10.—3 Dig. 373. 379, et seq.
(5) Mit. on Inh. ch I. sect. iv. § 17. 22.—Id. ch. II. sect. i. § 7. 28.
(6) Mit. on Inh. ch. I. sect. iv. § 17, 18. 22.

science,—books, tools, and implements of art belong generally to those who can best employ them, the rest taking to other parts of the property, unless where the whole consists of nothing else; in which case there must be a general distribution, or a sale, and equal division of the proceeds. But the most general ground of impartibility is *separate acquisition*.(1) The common stock (as has been repeatedly observed) may consist either of ancestral, or of acquired property, or of both; and, having been augmented or improved, the benefit, on partition, as well as during the period of joint occupancy, accrues to all alike, without regard to the degree, in which each may have contributed to its enhancement. It is like *accretion*, under the civil law. The property is substantially the same that it was, though rendered more valuable by cultivation and care.(2) But a member of an undivided family, continuing such, and enjoying, in common with his co-heirs, every advantage incident to their unseparated state, may, in the mean time, acquire separate property to his own particular use; in which, upon a division, they will have no right to share. But the acquisition, in order to be so, must have been an original and independent one; the essence of the exclusive title consisting in its having been made by the sole agency of the individual, without employing for the purpose what belongs in common to the family. If the family property have

(1) Post, Append. to ch. IX. p. 371.

(2) Mit. on Inh. ch. I. sect. iv. 30, 31.—3 Dig. 387.
Purtaub Bahauder S. *v.* Tilukdhasee S.; Beng. Rep. 1807, p. 101.
Sheopershaud S. *v.* Kulunder S.; Beng. Rep. ante 1805, p. 82.

been instrumental to it, it vests in the family.(1) Whether it have been so, to the effect of rendering joint that acquisition which was, in fact, the product of an individual, may be sometimes a question of nicety, suited to the subtle disquisition of Hindu lawyers. Assuming as a Hindu principle, that *de minimis non curat lex*, (it being said, on another occasion, that "things "of ordinary value may be given up, *for they are mere* "*chaff*,"(2)) in the instances adduced, of a coparcener, in the practice of separate agriculture, taking a rope for his plough out of the common stock, or of one begging alms, in a pair of shoes that had belonged to it,(3) it might be disputed, whether such contributions could invalidate his pretensions to an exclusive right in property so acquired. The question, in these cases, must be one of discretion.(4) It seems agreed, that maintenance in the family, during the period of the separate acquisition, though it contribute to the end, is not alone sufficient to affect it with a joint character, the expenditure for the purpose being incidental.(5) As well (says an author) might it be said that it should be common, inasmuch as the acquirer "sucked "his mother's milk."(6) So, though there should have been ever so considerable a disbursement from the family property, on his initiation, or marriage, neither

(1) Menu, IX. 208.
Jim. Vah. ch. VI. sect. i. § 5. 10. 21. 24.
(2) 3 Dig. 331.
(3) 3 Dig. 358.
(4) Post, Append. to ch. IX. p. 372.—E.
(5) Jim. Vah. ch. VI. sect. i. § 47.—Post, Append. to ch. IX. p. 374.
(6) Visverupa, Jim. Vah. ch. VI. 1. § 48.

will this subject his individual gains to be participated; (1) because every thing of the kind is collateral to them, and not with the view in question; whereas, to take the case out of the rule, where there has been no conjoint labour, the common fund must have been directly instrumental. (2) The rule applies to all the various modes by which property is acquirable, as agriculture, merchandise, service, science, and military achievement; with gifts, or presents; as also to whatever may have been recovered, by an unseparated member, of family property, which, in the time of the ancestor, had been lost. (3) But, with regard to a gift, in order to its vesting separately, it must have been pure in its motive, and personal in its object; for, if it were in return for something previously given, it would be liable to be considered as common property, common property having been used in obtaining it. (4) Not that wherever there have been mutual gifts, the gift to the coparcener is necessarily partible. It depends upon whether the one have been in consideration of the other, a present made, with a view to a return. (5) A gift under such circumstances loses the nature of one; *do ut des*, it is too like a contract, the result of which is common. *Nuptial* gifts, which a man receives with his wife, are

(1) Jim. Vah. ch. VI. sect. i. § 49.

(2) Jim. Vah. ch. VI. sect. i. § 16. 46, et seq.—3 Dig. 552.

(3) Jim. Vah. ch. VI. 1. 36.—Mit. on Inh. ch. I. iv. 6.

(4) Menu, IX. 206.—Jim. Vah. ch. VI. i. 7, et seq.
Yajnyawalcya, 3 Dig. 543.—Mit. on Inh. ch. I. iv. 1.
Nareda and Vyasa, 3 Dig. 544.

(5) 3 Dig. 363, et seq.

particularly noticed as exclusively his; (1)—which is the more remarkable, as the funds of the family must bear the expenses of the marriage; but, as already intimated, this does not render them partible, the expenditure being incidental only. So, as to what is received at a marriage, in the form termed *Asura*, at which presents are made by the bridegroom to the father, or kinsmen of the bride.(2) It must be exclusive also to the donee; for, if it be made on the ground of his being the son of a particular person named, all the other sons (if any) participating in the consideration, the effect of common relationship prevails; and it is the same as though it had been expressed as for all, in which case there could arise no question as to the effect.(3) It is of no importance who the giver is, and therefore, upon principle, a gift by a stranger through commiseration should be the donee's; yet such a gift ensures to the benefit of the family of which he is a member, though not referable to the joint funds; and *treasure found* is another exception; both *alms* and it being, at all events, partible.(4) The instance of presents is of this importance, that it is the most usual mode in which acquisitions are made, without expenditure;(5) particularly among the Brahmins, with whom they are one of the seven recognized means of acquiring property, though not a commendable mode, even when received

(1) Menu, IX. 206.—Jim. Vah. ch. VI. sect. i. § 9. 33.
3 Dig. 363.—Daya Crama Sangraha, ch. IV. sect. ii.

(2) Mit. on Inh. ch. I. sect. iv. § 6.
Menu, ch. III. 25.—Ante, p. 42.

(3) Sricrishna, note to Jim. Vah. ch. VI. sect. i. § 51.—3 Dig. 401.

(4) Sricrishna, note to Jim. Vah. ch. VI. sect. i. § 37.

(5) Jim. Vah. ch. VI. sect. i. § 8.—Menu, X. 115.

from respectable persons; while acceptance of them from low ones is so much the contrary, that it requires to be expiated by abandonment, and rigorous devotion.(1) And, though the benefit of them belongs, in point of law, to the individual,—in practice, partition of gifts is said to be not uncommon, particularly among the liberal; founded, it may be, sometimes, on the mistake of supposing an acquisition to be subject to partition, simply because it was obtained by an unseparated coparcener, according to an ancient opinion, that has been refuted.(2) Next, as to *property recovered;* at whatsoever time lost, and referable to whatsoever title, so it be family property, (3) being redeemed, without use of the common stock, it belongs exclusively to the recoverer, notwithstanding the former right. (4) The recovery, however, according to some authorities, (5) must have been with the privity of the co-heirs, unless there appear to have been an abandonment by them, of which silent neglect on their part may be evidence.(6) It must at least have been *bonâ fide*, that is, not in fraud of their title, by anticipating them in their intention of recovering it. Still less would it be available to exclude partition, if pursued in face of an express injunction on their part.(7) It is laid down by

(1) Menu, ch. XI. 24. 42. 70. 254.

(2) 3 Dig. 401.—Jim. Vah. ch. VI. sect. i. § 53.—Id. sect. ii. § 13, note.

(3) Sricrishna, note to Jim. Vah. ch. VI. sect. i. § 33.—Id. ii. 37.

(4) Menu, IX. 209.—Yajnyawalcya, 2.—3 Dig. 343.
Mit. on Inh. ch. I. sect. iv. § 1.
Jim. Vah. ch. VI. sect. i. § 40.
Daya Crama Sangraha, ch. IV. sect. ii. 11.

(5) Mit. on Inh. ch. I. sect. iv. § 2.
Chandeswara, Contra.—3 Dig. 364, 365.
Post, Append. to ch. IX. p. 377.

(6) 1 Dig. 214.

(7) 3 Dig. 367.—Daya Crama Sangraha, ch. IV. ii. 8, 9.

Jimuta Vahana, and in the Mitacshara, on the authority of Sancha, that land is not included in this rule; a position not admitted by Jagannatha.(1) Where, from circumstances the recovery is available to the family, the recoverer, on partition, takes a fourth, and the residue only is divisible.(2) As to gains by *science*, the the rule applicable to these embraces a variety of particulars, the root (*vid*) from which the Sanscrit word (*vidya*, science) is derived, signifying any knowledge, or skill.(3) " In fact, (says Jagannatha,) in all cases whatsoever, " wherein superior skill is required, the wealth gained is " technically denominated the acquisition of science."(4) Hence, beside what may be gained by it in its more direct and appropriate sense, it includes what is received by a teacher from his pupil, or by a priest from those for whom he has officiated; a fee for an opinion in law, or upon any other subject on which the receiver may have been professionally consulted; a literary prize, or a reward for reading in a superior manner; not to mention what is won at play.(5) It extends also to the liberal and elegant arts, among which working in metals, long practised in the East, is enumerated, with music and painting. Thus, having taken gold, for instance, and

(1) Sancha, 3 Dig. 375.—Yajnyawalcya, Id. 343.
Jim. Vah. ch. VI. sect. ii. § 38, 39.—Mit. on Inh. ch. I. sect. iv. § 3.
3 Dig. 367.
See also, Beng. Rep. ante 1805, p. 36; which seems to have been a case of land.

(2) Mit. on Inh. ch. I. sect. iv. 2.
Post, Append. to ch. IX. p. 179.—C.

(3) Jim. Vah. ch. VI. sect. ii. § 17.

(4) 3 Dig. 339.

(5) Jim. Vah. ch. VI. sect. ii. § 1 to 13.—Catyayana, 3 Dig. 333.
Daya Crama Sangraha, ch. IV. sect. i. 13, et seq.
2 Dig. 65. 179.

made it into bracelets, the ornament, so far as respects the material, is common and partible; while the value superadded by the skill of the artist, regarded as an acquisition made through science, is subject to the rule applicable to that particular subject.(1) With respect to gains by *valour*, falling under the same consideration,(2)—by these, technically understood, is not meant military pay, which, as to its partibility, is not distinguishable from any other ordinary acquisition;(3) but such, where extraordinary prowess has been displayed; being resolved by Menu,(4) and others, into the reward of a gallant action in the field, or into spoil taken under a standard, after a rout of the enemy; of which latter it is remarkable, that, as with us, it does not vest without the assent of the king.(5) By the ancient law, acquisitions by the elder brother, without use of the family property, were partible with such of the rest as had cultivated learning; on the ground that, after the death of the father, being in *loco parentis*, he could not acquire for himself exclusively; but this consideration of the elder brother gradually subsiding, the distinction is worn out, and he stands, in this respect, as in others, now, upon the same footing with the rest.(6) Wherever there has existed an employment of the joint funds, or

(1) Jim. Vah. ch. VI. sect. ii. note to § 1, and § 11.
(2) Jim. Vah. ch. VI. sect. i. § 10. 12, and note to § 51.
(3) 3 Dig. 346, et seq.
(4) Menu, cited in 3 Dig. 367.
Catyayana, cited in Jim. Vah. ch. VI. 1. 20.
(5) 2 Dig. 155. 158.
(6) Menu, IX. 204. 109, 110
3 Dig. 371.
Jim. Vah. sect. i. § 54.

a common exertion of the co-heirs, in either of which cases the acquisition is partible, the acquirer takes a superior share. In all other instances, that of property recovered excepted, a share, *extra* the number that is to divide, is given to the special acquirer, beyond his equal share; and, if more than one have been concerned with him, they participate in the excess.(1) In the instance of *property recovered*, the special claim of the recoverer is to a fourth only, instead of to a double share; the merit of recovering what has only been withheld, not being considered equal to that of making a new acquisition.(2) But whether by this is to be understood a fourth of the whole property recovered, or only a fourth of an equal share, added to a share, seems uncertain.(3) Claims to extra shares may of course be adjusted with consent of parties, being sometimes treated as discretionary in amount.(4) But the specific measures are as has been stated. This effect of the use of the joint stock, in rendering separate acquisitions, in general, common, is attended sometimes with injustice, where, in cases of small patrimony, large fortunes are made by the unaided exertions of enterprising parceners; of which the benefit may eventually be shared by drones, who have in no degree conduced to their accumulation.(5) Nor, to obviate this, is there any resource, where timely

(1) Jim. Vah. ch. VI. i. 28.—Mit. on Inh. ch. I. iv. 29. Vasishta, 3 Dig. 356. 405.

(2) Jim. Vah. ch. VI. sect. ii. 39.—3 Dig. 366, 367. Radhachurn R. *v.* Raghoonunda R.; Beng. Rep. ante 1805, p. 36.

(3) Jim. Vah. ch. VI. sect. ii. 38.—Mit. on Inh. ch. I. iv. 3. Note to 3 Dig. 366.—Beng. Rep. ante 1805, p. 36.

(4) Post, Append. to ch. IX. p. 382.

(5) Ante, p. 19.—Post, Append. to ch. IX. p. 374.—E.

separation has been omitted; a right to the benefit of each other's labours being incident, where copartnership has continued, and the joint property been instrumental. But, where the latter has not been the case, the claim to participate fails, though made by an unseparated member.(1)

B. As to things *specially divisible;* they are distinguishable from such as are *impartible,* in that the latter are so upon the grounds that have been stated, the former, in point of fact, being of a nature to render division inconvenient, if not, as is often the case, impracticable; and for which, therefore, a virtual partition is substituted, where a direct one cannot easily, if at all, be had. Such are a road, a way, pasture for cattle, or a well; with other instances that have been already incidentally noticed;(2) and of which the number and kind are indefinite, liable to be modified by custom, whether local, or applicable to a particular class or community;(3)—and, in general, where this does not interfere, equality, subject to convenience, being the object, the means of attaining it appear to be left very much to the suggestions of reason and good sense, having regard to the circumstances of families, and the nature of the property to be divided.

3. *How partition takes place.*—Under this head are to be considered *first,* the modes that may be resorted

(1) Soobuns Lal *v.* Hurbuns Lal; Beng. Rep. 1805, p. 7

(2) 3 Dig. p. 372, et seq.
Daya Crama Sangraha, ch. IV. sect. ii. 13, et seq.

(3) Catyayana, 3 Dig. 375.

to for partition; *secondly*, the rules to be observed in making it. The modes being the same as on partition by a father,[1] namely, by arbitration, adjustment, or lot, in whichever way it is effected, the law prescribes an instrument in writing, called by Vrihaspati "the "written memorial of distribution," but it has not rendered it indispensable.[2]—It may be here remarked, that the instruments and agreements of the Hindoos are, in point of form, models in their way. Penned in general by the village accountants, (*conicopolies*,) while they express every thing that is material, they do so with a compactness and precision, not easy to be surpassed. A regular instrument of partition, being entitled according to its purport, the things distributed by it are specified by name, and may be inventoried on the back, the amount being noted also in figures, to preclude any fraudulent insertion subsequent. But they are considered to be best enumerated in the body; and this, so as to shew what each has received, that the fairness of the division may appear. With the date, the names of the parceners are inserted, designated by those of their fathers, the same names, among Hindoos, being usually common to many; for which reason, the paternal names of the drawer of the instrument, and of the witnesses to it, are added. Where it is *olograph*, there is the less necessity for witnesses; but they are in all cases recommended.[3] The greatest credit attaches to such

(1) Ante, p. 190.—Post, Append. to ch. IX. p. 385.—E.
(2) 3 Dig. 408.—Post, Append. to ch. IX. p. 389.
(3) Vrihaspati, 3 Dig. 408, with the commentary. Yajnyawalcya, 1 Dig. 23.

an instrument, executed in the presence of, and attested by the Raja, and his officers;(1) by which is to be understood simply a public, authenticated attestation. What the law expects in general is, that it should be attested by kinsmen; the want of whom, however, and the consequent substitution of more distant relations, or even of neighbours, is always open to be explained.(2) Such in fact is the order, in which witnesses for this purpose are classed; *kinsmen* being described as persons allied by community of funeral oblations, or as sprung from the same race; *relations*, as maternal uncles, and other collateral and distant relations of the family.

As to the partition itself, accounts being previously settled, and debts and other charges provided for,(3) whatever course be adopted, the division of all, acquired as well as ancestral, must be intrinsically the same, *i. e.* in general, equal, without deductions;(4) making allowance for disqualifications resulting from defects, moral and physical.(5) Even under the old law, the right of primogeniture, on partition, operated only upon what had descended, not upon that which had been acquired. With regard to this, as unequal augmentation of that which is ancestral leaves it still what it was, equally divisible, so, whatever is entitled to be considered as joint, is alike partible among all, without attention to the degree in which individuals may have contributed to its production;

(1) 3 Dig. 416.
(2) 3 Dig. 414.
(3) Ante, p. 166—191.
(4) Beng. Rep. Case 6. for 1818, p. 630.
(5) Ante, ch. VII. p. 152.

subject always to the special claim of any one, for extra acquisitions.(1) So, where the enjoyment of what is in common may have been unequal, that of some having been greater than that of others, the shares upon a division are still to be the same, the law taking no account of greater or less expenditure, unless the difference be such as to exclude all idea of proportion, the object entirely selfish, or the circumstances of a kind to impute fraud.(2) If the family of one brother, being more numerous than those of the rest, have, in the maintaining of it, incurred a greater expense, so it has been proportionate, and not excessive, the difference is not to be regarded when they come to divide; and the same principle applies as to what may have been laid out on the nuptials of a daughter, or the initiation of a son,(3)—occurrences, in Hindu families, which, it has been seen, constitute a charge on the joint property, where they are undivided.(4) But, if one, giving a loose to pleasures, in which the rest have not participated, have thereby broken in upon the common fund to an extent not to be justified, he will, upon partition, receive his portion, diminished by what he has dissipated; though it is said, that if more than the amount of his share have been so expended, the law does not direct that the excess shall be considered as a debt.(5) So, in the Bengal provinces, but not in Southern India, an unproductive

(1) Menu, IX. 205.—2 Dig. 584.
Mit. on Inh. ch. I. sect. iv. 31.—3 Dig. 387.
Post, Append. to ch. VIII. p. 312.

(2) 3 Dig. 391, to the end of the section.
Post, Append. to ch. IX. p. 394.—C.

(3) 3 Dig. 108.—Daya Crama Sangraha, ch. VII. 29.

(4) Post, Append. to ch. VIII. p. 170.

(5) 3 Dig. 299.—Vid. ante, p. 167.

parcener may be shared out of the property acquired; but must receive his portion of the original stock descended.(1) It is the same of a loan or gift, even for a good (as for a religious) purpose, if made by a parcener on his sole account; or of a sale, a purchase, or an hypothecation; the principle being, that the patrimony, or family property, is not to be arbitrarily aliened;(2) otherwise, where the purpose and end have been the support, the interest, or the spiritual benefit of the whole.(3)

4. With respect to *the proof of a disputed partition*, though the law favours separation, by which religious ceremonies are multiplied,(4) it presumes joint tenancy as the primary state of every Hindu family; and this especially among brothers, it being most natural for such "to dwell "together in unity."(5) Important as the question may be to strangers, appearances as to the fact are not always to be relied upon. The legal idea of *undivided*, regarding as it does, *property*, a family may be separated as to residence, meals, and ceremonies, so as to seem even to their neighbours, as well as to others, to be divided, without being so; remaining, in truth, united in interest.(6) As, on the other hand, having parted property, they may have become legally divided by a severance in their worldly concerns; and yet, continuing to live and eat together,(7)

(1) 3 Dig. 67.—Ante, p. 197.
(2) Ante, p. 18.—Post, Append. to ch. IX. p. 338. 339.—C.
(3) 2 Dig. 103.—3 Dig. 391, et seq.—Post, Append. to ch. IX. p. 338. 339.—C.
(4) Menu, ch. IX.—2 Dig. 534.—3 Id. 76.
(5) Post, Append to ch. IX. p. 347.—E.
(6) Id. p. 347.—E.
(7) Jim. Vah. ch. VI. sect. i. § 27.

performing also in common their solemn and accustomed rites, they will appear to be still united, though, in reality, and to legal purposes, they are no longer so. (1) This renders it, moreover, in many cases, where contested, (as it often is,) difficult to determine, whether the family be, or be not, a divided one. The question may arise among themselves, one member claiming partition, while the rest insist upon its having already taken place, at a time past. Or it may be raised by a creditor, having an interest in considering it as undivided, whereby he extends the fund for the payment of his debt, the credit having perhaps been given under this idea, though in truth, perhaps, a mistaken one. The obscurity in which it is sometimes involved, productive, as it is, not only of eventual litigation, but of occasional fraud and injustice, may be attributed to the law, allowing partition, without the presence of witnesses, or intervention of any deed; thus leaving a transaction of such possible consequence to others, as well as to the family, to be performed in secret, resting in the breasts, and in the consciousness alone of the parties. Where this has been the case, and the interest of any one is opposed to the claim, the fact remains to be collected from circumstances; observing, wherever the English rules of evidence do not prevail, the distinctions that have been noticed, as to the order and credit of the witnesses. (2)

The presumption raised by the law, from the natural

(1) 3 Dig. 417, et seq.
Khodeeram Serma v. Tirlochun; Beng. Rep. ante 1805, p. 37.

(2) Ante, p. 223.

state of families, in favour of union, may be destroyed, by evidence of separate acts, inferring a contrary one, and amounting to proof of partition having taken place.(1) Such are for this purpose religious ones, the religious duty of coparceners being single; (2) dressing food; transactions inconsistent with the idea of their continuing united, as making mutual loans, sales, purchases, and other contracts; or becoming sureties, or witnesses for one another, on subjects of property.(3) To which, as indicating the understanding of neighbours, may be added, delivery to them severally of provisions, and other dues, by the village peasants.(4) Of each of these a little more at large, in their order.

Of the religious duties of the Hindoo, some are indispensable, others in their nature voluntary. Of the latter sort are sacrifices, consecrations, the stated oblations at noon or evening, with whatever else there may be of a similar kind, the performance or non-performance of which respects the individual merely. It being, under any circumstances, competent to discharge these jointly or severally, it follows that the performance of them, the one way or the other, affords no inference as to the state to be investigated. The proof in question results from the separate solemnization of such, the acquittal or neglect of which is attended with consequences beneficial, or otherwise, to the individual, in his capacity

(1) Post, Append. to ch. IX. p. 387. 395.

(2) Mit. on Inh. ch. II. sect. xii.
Nareda, 3 Dig. 407. 417.—Post, Append. to ch. IX. p. 391. C. & E. & 393. 397.

(3) 3 Dig. 421.—Vrihaspati, Id. 427.—Yajnyawalcya, 1 Dig. 228.

(4) 3 Dig. 429.—Infra, p. 230.
1 Bombay Rep. p. 211.

of *Housekeeper*, *(Grihasta,)* or master of a family, the third and most important order among the Hindoos. Of this kind are among others, the five great sacraments, in favour of "the divine sages, the manes, the gods, the "spirits, and guests," enumerated, described, and enforced by Menu; it being of such, of which it is said, that of undivided brethren the religious duty is single, *i. e.* performed by an act in which all join; severing in them, and performing them separately in their respective houses *after* partition. (1) Still, such separate performance is not conclusive; it is a circumstance merely.(2)

Reciprocal gifts and mutual contracts are inconsistent with the relation of parceners; in which, generally speaking, every thing is in common. They become evidence, therefore, where they appear, of partition having taken place. So, with regard to income and expenditure, with the infinite dealings in which men's interests are concerned, carried on without consulting each other, and this publicly, and without reserve; the same inference arises. (3) As to separate acquisition, it concludes nothing, since, as has been seen, (4) it may take place, consistently with copartnership. And, with respect to any one, or more, of the instances specified, they are but evidence; though the concurrence of all, to constitute proof, is not requisite. (5) The one the most

(1) Menu, ch. III. 69 to 81.—Anon. text ccclxxxviii. 3 Dig. 420. 3 Dig. 417, 418.

(2) Post, Append. to ch. IX, p. 391.

(3) 3 Dig. 418.

(4) Nareda, 3 Dig. 417.—Id. 419.

(5) Jim. Vah. ch. XIV. 10.

to be relied upon is, the taking food, separately prepared. Yet, as it may be matter of convenience, among parceners having large families, to have separate cookery, dressing their victuals apart, this also is but a circumstance, which may be explained; or its effect, in point of evidence, may be removed, by shewing not separate, but joint preparation of grain, for oblations to deities, and the entertainment of guests, as well as for other purposes which, among united co-heirs, are essentially common. But, in general, a distinct preparation of food, after an agreement to separate, proves partition, and the previous agreement may in some cases be inferred from that sole evidence; but more satisfactorily in proportion as a greater number of the indicated circumstances concur. ([1])

Nor can brothers undivided, or other parceners, become sureties, or give evidence for each other, any more than make mutual loans. The connexion, so subsisting, forbids every thing of the kind. With regard to their being witnesses for, or against each other, the restriction does not apply to cases of slander, violence, or the like; but only to matters affecting the joint interest, and so raising a direct objection to their competency. Testimony therefore between them, admitted in such a case, implies partition.([2]) Jagannatha, in the close of his chapter on the subject, admitting that liberties may be taken with the patrimony, inconsistent with the relation under which it is held, so

(1) 3 Dig. 421. 428.
(2) 3 Dig. 421, et seq.

as to render equivocal, as proof of partition, many of the acts that have been alluded to, sums up the whole in the following words. "In a doubt (says he) respect-"ing a prior distribution, among those who severally "transact commercial affairs, and the like, but without "having separated their preparation of food by a previous "agreement, what (he asks) is the rule of decision, if the "dispute concern that property, to which the transactions "relate?—Deduce the principle of decision (he answers) "from reciprocal gift and receipt: for, in that case, "donation, which is an act done for a spiritual end, has "been made in contemplation of abundant fruit from "liberality to a kinsman. Again, the people know whe-"ther these co-heirs have separated their preparation of "food by previous agreement or not. Again, do the "peasants deliver to them, severally, the provisions, and "other dues from their village? Hence also a principle "of decision may be deduced. In like manner, the "question may be determined by their annual obsequies "for a deceased ancestor, and by their worship of "*Lachsmi*, or other deities, and the like." On this topic Jimuta Vahana adds,(1) "this, and similar acts, "can only be done severally by divided co-heirs; any "one of them must therefore be considered as a pre-"sumptive proof of partition, on failure of written, and "oral evidence."(2)

5. It remains to consider some *matters subsequent*, supposing a partition to have taken place. In general, once

(1) Jim. Vab. ch. XIV. 9.
(2) 3 Dig. 428.

made, it cannot be opened.(1)—Yet, if effects that were not forthcoming at the time, be afterwards *recovered*, in a way to warrant a claim to participation; and much more if *concealment* had taken place, a discovery leads to a second division.(2) In the latter case, the tenderness of the law, as to the means of ascertaining the fact, is remarkable, as if any thing like an exertion of authority for the purpose were, if possible, to be avoided; by which, however, is to be understood only, that persuasion is to be used in the first instance, rather than coercion;(3) it being admitted that, the former failing, more effectual ones may be resorted to, such as *ordeal;*(4) a mode of course not to be adopted in our Courts, in which trials and processes of all sorts are to be according to the provisions of their respective charters, or commissions. All authorities at the same time agree, that, to justify an ultimate proceeding of the kind, in order to force a discovery from an unwilling concealer, there should be a preceding inquiry, founded, not upon the light suspicion of any individual, but upon circumstances, the law forbidding hasty recourse to ordeal.(5) This delicacy, suitable to the intimate relation of the parties, is by some referred to the consideration, that *concealment* is simply a moral offence,(6) as opposed to *theft*, which is defined to be the taking of another's goods, where there exists in the taker

(1) Vrihaspati, 3 Dig. 399.—Id. 400.
(2) Catyayana, 4.—3 Dig. 398.—Id. 401.—Jim. Vah. ch. XIII. § 7.
(3) Jim. Vah. ch. XIII. § 7.
(4) Catyayana, 3 Dig. 395.—Id. 402.
(5) 3 Dig. 397.—See also, 2 Id. 9.—Culluca Bhatta, 1.—Id. 440.
(6) 3 Dig. 391.

no common property.[1] On discovery, distribution takes place, subject to the question, whether the concealer, who would have fraudulently appropriated what he kept back, is to receive, with the rest, an equal share. That he should, may be cited a number of authorities, including that of Jimuta Vahana :[2] to these may be opposed the reasoning of the Mitacshara,[3] with the analogy of the text of Menu,[4] which, in the case of an elder brother defrauding his younger ones, visits him at once with punishment and privation. Nor, upon the principle of its being still undivided, is he, by whom it has been attempted to embezzle, answerable for what he may have used, provided his consumption have not been more than would have subjected him to account, in the ordinary course of the employment by one coparcener, of property belonging in common to himself and the rest.[5] But, independent of concealment—

Wherever, from any cause not understood at the time, the division proves to have been *unequal*, or in any respect *defective*, it may be set to rights, notwithstanding the maxim that, "*once is partition of inheritance made;*"[6] —a position, that supposes it to have been fair, and made according to law.[7]

(1) Jim. Vah. ch. XIII. § 8, 9. 15, and note.
3 Dig. 397. Commentary on Yajnyawalcya.—Id. 401.

(2) Jim. Vah. ch. XIII. § 2.—3 Dig. 396, 397, 398.
Daya Crama Sangraha, ch. VIII. 2.

(3) Mit. on Inh. ch. 1. sect. ix. § 4, 5. 12.

(4) Menu, IX. 213.

(5) 3 Dig. 402.

(6) Menu, IX. 47.—3 Dig. 214.

(7) Menu, IX. 218.—Jim. Vah. ch. XIII. § 4, 5.
Catyayana, 3 Dig. 398.—Id. 397. 399, 400, 401.
Daya Crama Sangraha, ch. V. 22, 23. and VIII. 4.
Ante, p. 194. (2).

Distinct both from fraud and mistake, is the case, where, the partition not having been completed when it was begun, a *residue* remains undivided; upon which the rule is, that while it continues in the possession of any of the co-heirs, the title to their shares, of such as remain at home, is preserved to them to the fourth generation; and, where the ancestors of any one have been so long absent abroad, it is good as far as the seventh.(1) But, whether, in other respects, an undivided residue shall be subject to rules of succession relative to separated, or unseparated brothers, a difference of opinion exists.(2) In the mean time, pending its suspension, contrary to the course while the family continues generally undivided, the acquisition of a separated parcener, by means of such residue, is exclusively his; subject to an equitable allowance by him for the use he may have made of it; analogous to the case, as among partners in trade, to whom in general the law of co-heirs bears no affinity.(3)

Not only may an original partition be reformed, by means of a supplemental one, but there may be an entirely new one, upon a *re-union* of any of the separated parceners, competent to the purpose;(4) and this, as well after partition by a father, as among co-heirs.(5) The

(1) Jim. Vah. ch. VIII.
Devala, 3 Dig. 10.—Vrihaspati, Id. 443.
Ante, p. 188. 206.

(2) Post, Append. to ch. IX. p. 388.
Mit. on Inh. ch. I. sect. vi. 2. and 16.

(3) 3 Dig. 401.

(4) Mit. on Inh. ch. II. ix. 3.
Vrihaspati, 3 Dig. 512.—Id. 553.
Daya Crama Sangraha, ch. V. 3, et seq.

(5) Jim. Vah. ch. XII. 3.

deduction to which, by the old law, an elder brother was entitled on an original partition, merged on a re-union, reviving to him upon repartition, being a privilege he could enjoy but once.(1) A re-united parcener dying while the re-union continues, leaving no issue, but a widow, according to the Mitacshara,(2) she is entitled to maintenance only, the deceased's share vesting by survivorship in his coparceners; it being affirmed by Vachespati Misra,(3) that all texts suggesting her succession, in preference to them, relate to the estate of a husband who has made a partition with his brothers; while Jagannatha, reviewing the various opinions that exist upon the point,(4) contends that there is no difference in this respect, whether divided, or undivided: so that the schools differing, it may be liable to be differently determined, according as the one or the other prevails, in the Bengal provinces, or in those depending on the government of Madras. Other claims being disposed of, if the surviving re-united parceners be partly of the whole, and partly of the half blood, those of the whole take in exclusion of those of the half:(5) while, consisting of half blood only, any *dis*-united co-heirs of the whole divide with them,—union in blood being, for this purpose, equivalent to re-union in coparcenary.(6) And the participation of the

(1) Menu, IX. 210.—Jim. Vah. ch. XII. 1.
Note on 3 Dig. 550.—Vrihaspati, Id. 476. 552.

(2) Mit. on Inh. ch. II. ix. 4.—See also Yajnyawalcya, 3 Dig. 507. 476. Vasishta, Id. 477.—Vachespati Misra, Id.

(3) Vachespati Misra, 3 Dig. 477.

(4) 3 Dig. 478.—See also Menu, IX. 212.—*Vriddha* Menu, 3 Dig. 478. Vrihaspati, 3 Dig. 476. 438.—Culluca Bhatta, Id. 477.

(5) Mit. on Inh. ch. II. sect. ix. 6.

(6) Mit. on Inh. ch. II. sect. ix. 9.

half blood at all in this case regards the real estate only; for, as to moveable effects, they at all events descend exclusively to the whole blood, re-united or not.(1) The share of one who has entered into the fourth order, or become otherwise disqualified, on re-partition, vests in his representatives;(2) and, in general, the rules prescribed for an original partition are applicable to the one in question.(3)

Partition of estates by the Athenian law has met with its advocate in the eminent translator of the speeches of Isæus;(4) and the last public act of the celebrated Mirabeau was the preparation of an argument, (of which death prevented the delivery by him in the National Assembly,) against the testamentary power, as a source of inequality and injustice in the transmission of property. The system of perpetual partition may be proper for democratic governments, like Athens of old, and modern America. It exists partially in England under the denomination of *gavelkind*, a remnant of the old Saxon law; but has long been wearing out, not being adapted to a constitution like ours, in which unequal fortunes, and hereditary wealth, are indispensable to the maintenance of that aristocracy, or intermediate class, between the prince and the rest of the people, which forms one of the essential orders of the state. For the same reason, it is unsuitable to France, as settled under its late, and present Charter. It may be con-

(1) Jim. Vah. note to ch. XI. sect. v. 36.

(2) Mit. on Inh. ch. II. sect. ix. 13.—3 Dig. 476.

(3) Jim. Vah. ch. XII. 5.—3 Dig. 549, et seq.

(4) Commentary on Isæus, by Sir William Jones, p. 168.

sistent for despotic countries, such as India; by preventing that accumulation, which has a tendency to produce checks on the supreme power. Accordingly, the great Zemindaries of Bengal having been, by the custom of the country, or usage of particular families, descendible to the eldest, or other appointed son, in exclusion of the rest, it became the policy of Lord Cornwallis, when Governor-General, to adopt means for breaking them gradually down, by subjecting them, as deaths happened, to the law of partition.(1) It has been supposed indeed that, till our possession of them, *all* property was, in those provinces, among Hindoos, so descendible; *i. e.* to the eldest son exclusively. Had it been so, the conclusion would be, that it had been rendered so by their Mahomedan conquerors, innovating upon their ancient institutions. Whatever opinion may be entertained of its policy, the course of inheritance, as it at present obtains, with this class of natives, throughout India, is consonant to their original law,(2) though, how far to the advancement of the species in arts, and civilization, may be doubtful.

(1) Eleventh Bengal Regulation, 1793.—Ante, p. 198. 208. Post, Append. to ch. IX. p. 330.

(2) Menu, ch. VII. 203.

CHAP. X.

ON WIDOWHOOD.

It has been seen, in a former chapter,[1] that the wife surviving her husband, succeeds as heir to him, in default of male issue. It remains to be shewn in the present, how the widow's property descends, whether inherited from her husband, or otherwise derived, premising some account of the state of widowhood among the Hindoos;—a condition too peculiar, not to justify a distinct and separate consideration. The entire subject will be comprehended generally under the two following heads: viz. I. What regards her *person*. II. What regards her *property*.

I. In considering the law as it regards her person, three things in particular offer themselves to our attention. 1. Her obligation to *burn*. 2. The restriction she is under with respect to a *second marriage*. 3. Her *dependance*, in other respects.

1. The first thing that occurs, in contemplating the state of widowhood among the people in question, is, its horrid termination, almost the moment it commences,—in instances, in which religious enthusiasm has been made to operate, on the hopes and fears of the deluded victims;

(1) Ch. VI.

—to *burn* with her deceased husband, being inculcated upon the Hindu widow, not out of respect to his memory merely, but as the means of his redemption, from the unhappy state into which he is believed to have passed ;(1) and, as ensuring, in consequence, to herself, (not everlasting indeed, but) long-continued felicity. Ascending his pile, and casting herself with him into the same flame, she is said " to draw her lord from a region of torment, " as a serpent-catcher draws a snake from his hole." *Her* virtue expiates whatever crimes *he* had committed, even to the " slaying a Brahmin, returning evil for good, " or killing his friend." And, for this proof of it, a kind of Mahomedan paradise is promised her. They mount together to the higher regions ; and there, *with the best of husbands*, lauded by choirs of *Apsaras*, she sports with him as long as fourteen *Indras* reign ;—or, according to another medium of computation, for so many years as there are hairs on the human body. (2)

Absurd as all this is, it is disgusting to have to enumerate the precautions existing, in order to guard the

(1) Angiras, 2 Dig. 451.—Vyasa, Id. 454.
Asiatic Res. vol. iv. p. 209, 8vo. edit. Ante, ch. III. p. 61.

(2) Angiras, 2 Dig. 451.

Nec minus uxores famâ celebrantur Eoæ.
Non illæ lacrymis,—non fœmineo ululatu
Fata virûm plorant ; verum (miserabile dictu)
Conscenduntque rogum, flammâque vorantur eâdem !
Nimirum credunt veterum sic posse maritûm
Ire ipsas comites, tœdamque novare sub umbris.

De Anim. Immortal. i. 177.

Conjugis, Evadne, miseros elata per ignes,
Occidit ;—Argivæ fama pudicitiæ.

Propert. l. i. El. 15.

See also Euripid. Suppl. Act. v. ;—and an affecting instance in vol. i. p. 190, of Sir John Malcolm's Memoir of Central India ; together with Id. vol. ii. p. 296, note.

exercise of so scandalous a superstition;—regulation, in such cases, having, in some degree, the effect of sanction, as is the case with respect to gaming and other pernicious vices, in countries in which they are made subservient to revenue. And yet, while it is allowed to continue, it would, without some interference of the kind, be pregnant with tenfold murders, of the most horrid description. Hence, the burning, to be what is called legal, with a view to its prevention, when it may be confessedly inadmissible, or under circumstances rendering it so, must be with the privity of the ruling power. And as, in every instance in which it can be endured, the sacrifice, on the part of the victim, must be voluntary, it follows that it can be performed only by an adult, in possession of her faculties, and free;—not stupified for the purpose by drugs, nor influenced by designing Brahmins, or interested relatives; still less impelled by violence. (1) Of the latter, occurrences are but too frequent, where, from her inability to sustain the fiery trial, the unhappy devotee, relenting, is prevented from escaping, by the agency of persons prepared,—connexions for the most part;—who, to obviate the disgrace of failure, to say nothing of less justifiable motives, will sometimes with bamboos, push her into the hottest part of the fire; keeping her there by force, till life is extinct;—a conduct amenable to prosecution, but of which no instance appears, otherwise than as for a misdemeanor; though it goes nigh to realize the martyrdom of St. Lawrence. In order that nothing of the kind may happen, the local authorities

(1) 2 Bombay Rep. p. 95.

having had timely notice of what is about to take place, it is customary for the police officers to attend, and see that what may be in itself lawful, be legally performed;—*omnia rita esse acta*;—to apply a grave and salutary maxim, to a fiend-like proceeding!—Pursuing the same system of restriction, in a case where the thing is intolerable, and ought not to be permitted, to no woman is it permitted to burn, being pregnant at the time;([1]) —a condition, in a female, that has the effect with us, of suspending execution in a capital case;—nor, if she have children, or a child, not exceeding three years of age, unless some one will undertake to provide for it, or them, a suitable maintenance. This must be by engagement in writing, on the part of the nearest relation of the deceased. In the three inferior castes, the practice exists of cremation at a time subsequent, more or less, to that of the burning of the body of the husband, where he has died at a distance from the wife. It is called *Anoomurun*, in contradistinction to *Suhumurun*, importing to burn with it. But, to render *Anoomurun* legal, there should have existed some sufficient reason, why simultaneous burning could not take place; and the burning subsequent must follow, if at all, immediately upon the first notice of the death; the widow also being at the time in possession of something belonging to the deceased, to be burned with her, as of his turban, or sandal, which are the most usual symbols: though, according to circumstances, it may be his stick, his dagger, or his helmet: and, in an instance that occurred a few years

(1) 1 Bombay Rep. p. 95.

ago, among the Mahrattas, some of the bones of the deceased were sent to his widow for the purpose. But, to a Brahmin widow, *Anoomurun* is altogether incompetent: she can burn only on the same pile with her husband; so that, in the instance just alluded to, which was that of a Brahmin, the act was considered as having been illegal, unless to be justified by local custom, in opposition to the Shaster; and this notwithstanding that a part of the body of the deceased had entered into the ceremony.(1) By the Hindu law, as well as by ours, suicide is a crime; but the contrary is declared in this instance,—the motive sanctifying the act.(2)

Thus reprobated, that the practice has in it more of *malus usus*, than of law, may be inferred from the silence of Menu, and other high authorities; who, as the condition on which the widow may aspire to Heaven, have simply required that she should, on the decease of her husband, live a life of seclusion, privation, and decency.(3) —*Recommended* only by the Shaster, (whence any attempt to suppress it has been discouraged(4)) it is confined pretty much to the lower classes;—a proof, that it has no deeper root in the religion, than it has in the law of the country; from all which the conclusion would be, that it is a subject fitter for abolition, than for regulation.

2. To this tyrannic instance of marital selfishness must be added the prohibition to women of *second marriages;*

(1) Brahma Purana, 2 Dig. 455.—V. N. Purana, 2 Dig. 456. Vyasa, Id. 458.—Asiat. Reg. vol. iv. p. 12.

(2) Brahma Purana, 2 Dig. 455. See Post, Append. to ch. vii. p. 259.

(3) Post, p. 245.

(4) See Col. Wilk's Sketches, vol. i. p. 499.

and that this should apply, as it does, even to *virgin* widows,(1) is an abomination, surpassed only, if at all, by the practice that has just been denounced. The husband having kindled sacred fires, *(into which he is not expected to enter,)* and having performed funeral rites to his wife, *whom he has survived,* "may again marry, and again light "the nuptial flame."(2) Nay, so incumbent upon him is it to do so, with a view to his resuming the order of a *Housekeeper,*(3) (*Grihasta,*) that he is not to delay it a single instant.(4) But a widow who, though childless, slights her deceased husband by *marrying again,* not only brings disgrace on herself here below, but, according to the belief inculcated, is to be excluded from participating with him in another world;(5) a *second husband* being declared to be a thing not allowed to a virtuous woman, in any part of the Hindu code;(6) by which, when her lord is deceased, she is directed "not even to pronounce the "name of another man."(7) That the prohibition is as old at least as Menu, appears from the references to his Institutes; though, from its being included in the enumeration of things forbidden to be done in the present age,(8) a time is implied when it did not exist. That second marriages, by women, are practised in some of the

(1) General note at the end of translation of Menu, p. 364. Asiat. Res. vol. vii. p. 310.
(2) Menu, ch. V. 168.
(3) Ante, p. 35.
(4) 3 Dig. 106.
(5) Menu, ch. V. 161.
(6) Menu, ch. V. 162.—IX 65—See also Id. 175, 176. Post, Append. to ch. x. p. 400.
(7) Menu, ch. V. 157.
(8) General note, at the end of translation of Menu, p. 364.

lower castes[1] is, according to Hindu prejudices, no argument in their favour; these castes being, in many instances, not within the contemplation of the law. In the territories lately conquered from the *Peishwa*, a tax was found established on the *marriage of widows*, but the description given by the report,[2] in which they are noticed, rather confirms the restriction; at the same time that the practice implied gives colour to an account, of its having been determined, some years ago, by an assembly of Bramins at Poona, in the case of a young woman, (of family,) who had lost her husband, before she had been admitted to his bed, that she need not *burn*, but might *re-marry*.[3] Here might be discussed the course that once subsisted, permitting the widow of a childless husband, or the wife of an impotent one, to raise up issue to him, by the intervention of his brother, or other kinsman, or even of a stranger authorized for the purpose. The husband gave the authority; and, he being dead, the act was legal, if sanctioned by his friends, or other guardians of the widow.[4] But it belongs also to the subject of *adoption*; in the Appendix to the chapter upon which it will be found noticed, at sufficient length, considering that it is obsolete, and that, even while it prevailed, it was reprobated, and confined accordingly to the servile class.[5]

(1) 3 Dig. 149.—Post, Append. to ch. x. p. 399. 400. C.

(2) The Honourable Mountstuart Elphinstone's Report, p. 37, 38, and Append. to same, p. 7.

(3) Asiat. Journ. for July, 1822, p. 8.

(4) Vrihaspati, 2 Dig. 475.—1 Id. 325.
General note to translation of Menu, v. 3.

(5) Post, Append. to ch. iv. p. 201.

3. Not only is a Hindu widow restricted from marrying again, but *continence* is exacted of her, at the peril of forfeiting her exclusive property, as well as her right to maintenance;(1) as, in the event of her husband dying, under circumstances to entitle her to succeed as heir, a want of it, while he lived, bars her claim; as a failure in it subsequent, unexpiated, deprives her of the inheritance, after it have vested.(2)—Accordingly, it is required of her to reside, after his death, with the son, or sons of her husband, if he have left any;—and, if not, with his other relations,(3) among whom *guardians* are to be selected for her,(4) the right of appointment resting ultimately, as in the case of minors, with the king;(5)—the policy of the Hindu law, with regard to the sex, being, that it is never, at any period of their lives, or under any circumstance, to be independant.(6) "Day and night (says Menu,) must women be held by "their protectors in a state of dependance. Their fa-"thers protect them in childhood; their husbands pro-"tect them in youth; their sons protect them in age. A "woman is never fit for independance."(7) And a preceding text, in which the same condition is inculcated, establishes her dependance, if she have no sons, "on the near kinsmen of her husband; if he left none,

(1) Ante, p. 163. 172.
(2) 3 Dig. 479.—Post, Append. to ch. vii. p. 272.
(3) Jim. Vah. ch. XI. sect. i. 56, 57.
(4) Jim. Vah. ch. XI. sect. i. 64.
(5) Menu, ch. VIII. 28.
Post, Append. to ch. vii. p. 272. C. ch. viii. p. 309. C.
(6) Yajnyawalcya, 2 Dig. 381.—Anon. Id.—Nareda, 2 Dig. 384.
(7) Menu, ch IX. 2, 3.

"on those of her father; and, having no paternal kins-"men, on the sovereign;" concluding, as already stated, that "a woman must never seek independance;" and carrying the principle the length of declaring, that "by a girl, or by a young woman, or by a woman "advanced in years, nothing must be done, even in "her own dwelling-place, according to her mere plea-"sure."(1) Failing relations of her husband, she is to reside with her own, enjoying their protection, and being subject to their control. *If she do not like to burn*, the alternative for her is a life of austerity and privation;(2) for the securing of which it is, that her liberty, in disposing of herself, after the death of her husband, is thus restricted; the same reserve, for the same purposes, being also enjoined to her, in case of supersession, (3) or of her husband happening to be absent.(4) To the *virtuous* widow, persevering in the system of self-denial prescribed for her, not only are honour, and protection, and maintenance pledged during life, but the prospect also of heaven is expressly held out to her, *though childless;* it being expected she should live in the practice of austerities, with suppressed passions; foregoing every thing like show in dress, and luxury in food; using such property as she has for necessaries, including religious purposes; but not in lavish expenditure, or indiscriminate alienation, as humour or fancy may prompt.

(1) Menu, ch. V. 147, 148.

(2) Menu, ch. V. 150 to 161.—Vishnu, 2 Dig. 459.

(3) Ante, p. 52.—Post, Append. to ch. x. p. 401. C.

(4) Sancha and Lichita, 2 Dig. 448.—Yajnyawalcya, 2 Dig. 450.

That she should be under some control, seems so far consistent, since, as her husband's relations are bound to provide for her in case of need, they have a claim to the means of preventing her, by her improvidence, from falling into distress, and so requiring their assistance. To this extent, therefore, their interference, not degenerating into treatment unnecessarily harsh, much less insufferably cruel, might be deemed to be within the scope of that *domestic* authority, the exercise of which, as legitimate, has been preserved to the natives by the legislature, in those acts, upon which the charters, establishing the King's Courts at the several Presidencies, are founded.(1)

II. As to her *property.*—Her right of inheriting to her husband, and, that not attaching, her claim to be maintained by his representatives having been discussed in former chapters,(2) it remains to treat of her power over what she has, and to shew how it vests at her death; distinguishing between what she possesses in right of her husband, and her *Stridhana;* which, as has been seen,(3) is more emphatically her own. With respect not only to what she may have inherited from her husband, but to its accumulated savings also, her duty is to regard herself as little more than tenant for life, and trustee for the next heirs, of property so possessed; being (as already intimated) restricted from aliening it, by her sole independant act, unless for necessary subsistence, or purposes

(1) Shevochuud Rai v. Lubung Dasee; Beng. Rep. ante 1805, p. 24. 21 Geo. 3. ch. LXX. § 18.—37 Geo. 3. ch. CXLII. § 40.

(2) Ch. VI. p. 154.—ch. VIII. p. 171.

(3) Ante, p. [illegible]6.

beneficial to the deceased.(1) If in any thing she may take liberties with it, it is in making pious and charitable gifts, with presents to her husband's relations and dependants, but not to her own, without their assent; the concurrence of her legal guardians and advisers, as well as of her husband's heirs, being generally necessary to any alienation by her of such property;(2)—by heirs being meant, not the immediate ones merely, but the whole, living at the time;—their assent to be manifested by their attesting the conveyance, or by other expression of it in writing. The restriction, however, in the extent stated, seems to concern land only; with this difference between the Bengal and Benares schools, that the former confines it to such as has been derived from her husband;—the latter, prevailing to the Southward, to land held by her, under whatever title; the law also requiring a deed, and seisin, to perfect the transfer.(3) Whereas, with regard to moveables, (slaves excepted, that are considered as land)

(1) Shevochund Rai *v.* Lubung Dasee; Beng. Rep. 1805, p. 24.
Id. 1812, p. 344.
Jim. Vah. ch. XI. sect. i. 56, 57.
Daya Cr. Sangraha, ch. I. sect. ii. 3. 5.
Ante, p. 27.—Post, Append. to ch. vi. p. 251.
Id. to ch. x. p. 408, 409.
See also, 1 Bombay Rep. p. 412. 415. 423.

(2) Jim. Vah. ch. XI. sect. i. 56. 63, 64.
3 Dig. 463 to 473.—Id. 576. 626, et seq.
Shevochund Rai *v.* Lubung Dasee; Beng. R. ante 1805, p. 24.
Beemloh Dibeh *v.* Goculnoth; Id. p. 32.
Mahooda, &c. *v.* Kuliani; Id. p. 67.
Gungaram Radaree *v.* Kashlakant R.; Id. ante 1813, p. 263.
Gopulchund Chuckavourtee *v.* M. Rojunee; Id. 1816, p. 500.
Post, Append. to ch. x. p. 407, 408, 409.

(3) Jim. Vah. ch. IV. sect. 23, note.
Nareda, 3 Dig. 575.—Catyayana, Id. 576.
Sham Singh *v.* M. Umroatee; Beng. R. ante 1813, p. 395.
Post, Append. to ch. x. p. 408, 409.

she has a greater latitude; reserving always one half for the due performance of his funeral obsequies.(1) And her *Stridhana* being peculiarly hers, whatever falls under this description, would seem to be not only hers without reserve, for present use; but to be at her independant, and uncontrollable disposal.

It has been seen, in a preceding chapter,(2) how the property of a woman descends, she dying in the life of her husband. Of that which devolves on her from him, he dying, leaving no son of any description, the landed part, or whatever comes under that description, descends on her death to *his* heirs, not to *hers:* the principle being, that it vests in those who would have taken it upon his death, had she at the time not existed.(3) This, in the case supposed, is the daughter, or daughters of her husband, if he have left any; for the sake (as is said) of the male issue, which they have or may have; and, on this ground, liable to be postponed to a sister, having a son. So say the writers of the Eastern school.(4) But, according to the Mitacshara,(5) and its followers, property, which the widow may have acquired by inheritance, is transmissible to her own heirs, classing with this school as part of her *Stridhana;* of the descent of which some

(1) Sree Narrain R. v. Bhya Jya; Beng. R. 1812, p. 343.
Mohun Lal Klan v. Ranee Siroomunnee; Id. 352.
2 Bombay Rep. p. 428.

(2) Ante, p. 51.

(3) Post, Append. to ch. x. p. 404.

(4) Jim. Vah. ch. IV. sect. i. 7.—Id. XI. i. 57, et seq.
3 Dig. 468. 472, et seq. 576. 626.
Mt. Bijya Dibeh v. Mt. Unpoorna D.; Beng. Rep. 1806, p. 86.
Post, Append. to ch. x. p. 402. C.

(5) Mit. on Inh. ch. II. sect. xi. 2, and note.
See Beng. Rep. 1812, p. 344.—Post, Append. to ch. x. p. 404.

account is next to be given, the nature of it having been already explained, in a former chapter.[1]—

Of *Stridhana*, or woman's "*property*," (as it is denominated) its peculiarity is seen in nothing more than in the intricacy with which succession to it is regulated; depending as it does, not upon rules, or texts, relative to property left by a man,[2] but upon the *form of marriage*,[3] the *source* from which it has been derived, or the *time* when it was *acquired*. Belonging to an *unmarried* female, with exception of a nuptial present, (which, where it exists, reverts on her death to the bridegroom,) her *Stridhana* goes first to her uterine brothers,[4] whom failing, to her parents in succession, the mother taking before the father;[5] and if to a *married* one, whether she die, living her husband, or a widow, the immediate heirs to it, including personalty inherited from her husband, with land also, according to the Mitacshara, are her lineal descendants in the female line;[6] the reason of which is not very creditable to the good sense of the law, founded as it is, on a supposition, that *portions of the mother abound in her female children;* the notion being, that "a male child is procreated, if the seed predominate, but a female, if the woman contribute most to the

(1) Ante, ch. I. p. 26.
(2) 3 Dig. 601. 603.
(3) Mit. on Inh. ch. II. sect. xi. 30.
(4) Post, Append. to ch. x. p. 411.
(5) Jim. Vah. ch. IV. sect. iii. § 7.
Gautama, 2 Dig. 614.
Baudhayana, Id. 612. 615.
(6) Menu, IX. 131. 192, 193. 195.
Mit. on Inh. ch. II. sect. xi. 9. 12, et seq.
3 Dig. 589. 595. 597. 600. 607.

"*fœtus;*"(1) so apt were the old Hindu lawyers to mix, with their gravest reasonings, ideas not less absurd, than, according to *our* conception, indelicate. The course of succession, in the female line, is the same with that which is established, where daughters inherit, mediately or immediately, to their father.(2) After daughters, and grand-daughters, the property in question goes to sons, in a certain prescribed order;(3) and, in default of all issue, the succession varies, according to circumstances. The marriage having been *in an approved form*, and the wife dying without issue, the husband, (surviving,) and his kin successively, are her heirs;—if *in any of the less approved ones*, her own;(4) and one course is ordained with reference to what was obtained by her *on her nuptials;* another, as to what may have been acquired by her during her *coverture*.(5) Beside which, other distinctions prevail, particularly with respect to her *fee*, or *perquisite*, described by some, as the present made her upon soliciting her in marriage,(6) by others, as the bribe to induce her to go to her husband's house, upon its final solemnization.(7) Adverting to each, the law has

(1) Menu, ch. III. 49.
Mit. on Inh. ch. I. sect. iii. 10.

(2) Ante, ch. VI. p. 137.

(3) Mit. on Inh. ch. II. sect. xi. § 9.

(4) Menu, IX. 196, 197.
Jim. Vah. ch. IV. sect. ii. § 24, 25. sect. iii. § 2, et seq. and § 6.
Mit. on Inh. ch. II. sect. xi. § 10, 11.—3 Dig. 606.
Post, Append. to ch. x. p. 411. 412.

(5) Ante, p. 50.

(6) Note to Jim. Vah. ch. IV. sect. i. § 5.

(7) Jim. Vah. ch. IV. sect. iii. § 21.
Mit. on Inh. ch. II. sect. xi. 5.—3 Dig. 570.—Ante, p. 29.
Daya Crama Sangraha, ch. II. sect. iii. 17, 18.

settled the succession to the greatest imaginable extent; as will appear by reference to the works that treat at large on the subject,(1) including the "Summary" by Sricrishna, subjoined to the appropriate chapter in the Daya Bhaga of Jimuta Vahana,(2) which summary will be found in the Appendix to this work.(3) To what extent these distinctions prevail in practice, can only be known by local investigation; *usage* being a branch of Hindu law, which, wherever it obtains, supersedes its general maxims.(4)

It being far from the purpose of these pages to uphold, with reference to the Hindoos, any system, whether of abuse, or of unmerited admiration, but their object, on the contrary, being, to represent, with all practicable exactness, a faithful outline of their *institutes*, within the professed limits, as the same is to be collected from resources within our reach,—the deformity of their law, as it, in many particulars, respects the sex, especially in its widowed state, has been impartially exhibited. Ungracious as it may appear, the question will still occur, as to the *degree* in which such a code of restraint and privation is acted upon; *how* it operates in families; what may be the *real*, as well as the *legal*, state of

(1) Jim. Vah. ch. IV.—Mit. on Inh. ch. II. sect. xi.
S Dig. 537.
Daya Crama Sangraha, ch. II. sect. iii. 4, 5.
Prankishen Sing *v.* Mt. Bagwhutee; Beng. Rep. ante 1805, p. 3.

(2) Jim. Vah. p. 100.

(3) Post, Append. to ch. x. p. 414.

(4) Menu, ch. I. 108. 110.—Ch. VIII. 3. 41. 46.—1 Dig. 95.
M. Sutputtee *v.* Indranund Jha; Beng. Rep. 1816. p. 512.
Post, Append. to ch. iv. p. 181.
1 Bombay Rep. p. 426, note.

widowhood, among these people. To resolve this, resort must be had to the works of such, as have had an opportunity of looking into the interior, and detail of Hindu life; if any there be, whose account of so delicate a subject can be relied upon. Nor is it intended to repress any just indignation, to which that deformity is calculated to give rise, by the recollection, that, however odious, its parallel is found among the most renowned nations of antiquity. A few words will suffice to assimilate the condition of the sex among the old Romans. *Mulieres omnes*, (says Cicero,) *propter infirmitatem consilii, majores in tutorum potestate esse voluerunt:* (1) and Livy, to the like effect, *Nullam ne privatam quidem rem agere fœminas sine auctore voluerunt; in manu esse parentûm, fratrum, virorum.* (2) Whence Plautus, in Mercator, Act. iv. Sc. vi.

> *Ecastor, lege durà vivunt mulieres,*
> *Multoque iniquiore, miseræ, quam viri!*

It was the same before them with the Greek women; nor can these strictures in this respect be better closed, than by the following extract from a late elegant little work, on the states of ancient Greece, whose institutions the Romans copied; exhibiting, with regard to the vassalage of the sex, the substance of many a text of Menu, and yet not a perfect picture of it, as it existed at the time to which the account refers; omitting, as it does, all allusion to that extraordinary feature, already noticed, the power

(1) Cic. pro Muren. 11.
(2) Liv. xxxiv. 2.

of the husband to dispose of his wife by *will*, to any man whom he might choose for his successor. (1) Speaking of the Athenian women, in an age too of refinement, "They lived (says the learned and ingenious author) in "a remote quarter of the house, and were never allowed "to mingle in society with the men. They were not "permitted to go abroad, without being attended by a "slave, who acted as a spy upon their conduct. They "were given in marriage without their consent; and were "expected to make the care of their families the sole "object of their attention. In a funeral oration com-"posed by Plato, in the person of Pericles, he makes "that illustrious statesman exhort the Athenian women, "to mind their domestic concerns; and assure them, that "they would be most faithful in the discharge of their "duty, when they never attracted the notice of their "fellow-citizens."(2)—Thus verifying, perhaps, with reference to distant ages and countries, the complaint of Medea in Euripides,

Γυναῖκες ἐσμὲν ἀθλεώτατον φυτόν;

upon which it may be remarked, that whatever is selfish and illiberal recoils commonly, in a variety of ways, upon those who promote it; and that, in the instance in question, the system adopted, discreditable to man, in proportion as it outrages nature, probably never realized the purpose in view.

(1) Ante, p. 60.
(2) Hill's Essays on the Institutions, &c. of the States of ancient Greece, p. 256.

CHAP. XI.

ON THE TESTAMENTARY POWER.

It having been long since observed by Sir William Jones, and being a thing agreed, that the Hindu law knows no such instrument as a *will*,(1) nor any power in the owner of property so to dispose of it, an apology may be expected for a chapter on the subject. The truth is, that, by the law in question (as under other ancient codes, including our own(2)), if not previously distributed in his lifetime, property has been left to descend, on the death of its owner, to his heirs. He has not been allowed to designate *who* should enjoy it after him, the law having not only established a course of inheritance, intended to be indefeasible, and which in general is so, but having also made an equitable provision for female issue, and a variety of collateral dependants, where they exist; guarding, at the same time, what it has so ordained, with the most anxious care, by suitable restraints upon alienation. The line of heirs extends (as has been seen) beyond the relations of the deceased, to connexions and claimants no way allied by blood;—all of whom failing, the doctrine of escheats here, as in other coun-

(1) Note to 2 Dig. 516.

(2) Hæredes, successoresque sui cuique, *liberi*; *et nullum testamentum*.—Tacit. de Germ. § 20.

tries, steps in, vesting in the sovereign an ultimate right of succession, where no other prescribed one can be shewn.(1) This being so, whether the son have, by *nature*, a claim to succeed to his father's property, it becomes immaterial to inquire; sufficient be it, that he has it by *law*. And, if so, it is idle to be considering whether the unqualified concession may not make heirs disobedient, and headstrong, such arguments cutting both ways;—since a contrary doctrine has a like tendency to render parents capricious and arbitrary, to which the Hindu law has shewn itself awake, by protesting against the effect of such a partition, by a parent in his life-time;(2) while it has shewn its consistency, by proscribing, as incapable of a share, an "enemy to his "father."(3) Any apology then for what follows, if required, must be sought for, in the practice that has obtained, among the Hindoos at our Presidencies, of indulging in the liberty of *wills*, for which their language has not even a name.(4) That *we* possess it, can be no plea for our sanctioning it in *them;* the less, that, in the extent in which it is allowed to us, it has been disapproved by the author of the Commentaries; who, recognizing the claim of children on the property of their parent, observes, that "it had not been amiss, if he had "been bound to leave them at the least a necessary sub-"sistence."(5) Such being the indisputable Hindu law,

(1) Ante, ch. VI. p. 149.

(2) Ante, ch. IX. p. 194. 196.

(3) Mit. on Inh. ch. II. sect. x. 3.—Vid. tam. ante, p. 197.

(4) Post, Append. to ch. xi. p. 417. 419. 421. 428. 450.

(5) Blackst. Comm. vol. i. p. 450.—See also vol. ii. p. 373, 12th edit. 8vo.

as in force to the Southward, and the Courts at our Presidencies having been, in all time, in matters of inheritance, sworn to administer justice to the Native according to *his own*, in contradistinction to *ours*, it may be difficult, at this day, to account satisfactorily, and with credit to the first innovators, for the principle upon which, within those limits, so great, and, it may be added, so pernicious an anomaly, as a Hindu *will*, was originally sustained. With respect to Madras, beginning, as it did, in the Mayor's Court, but too much reason exists, for apprehending, that it originated in motives not of the most honourable nature; being a device, by means of which *native* property, to a great amount, became subject at the time, and long after, to European management. So unseemly a period, indeed, has passed away; having been succeeded by a purity, not only in the exercise of government, but in the administration of justice, also, upon which it is consoling to reflect. The practice however subsists; and being, with reference to the individuals concerned, essentially vicious, it remains open to examination; and one thing seems plain, that, in affirming it, Courts must have a resting place somewhere. Neither in the English, nor in the Hindu law, can they find any. The latter, as in force to the Southward, repudiates every idea of the kind, in the form and extent to which it has been attempted to carry it; and, for the English, it is excluded by our Charters, wherever *the inheritance of the native* is concerned. Can then the right of a Hindoo, to dispose of his property by will at Madras, be referred to *custom?* *Custom* is a branch of Hindu, as it is of our

own law. "Immemorial custom (says Menu) is tran-"scendant law."(1) But, how does he define it?—pretty much as my Lord Coke would define it, by "good "usages, long established."(2) And what are *good usages* for this purpose?—"practices not inconsistent with the "legal customs of the country."(3) Can the practice in question be considered, for the Hindoos, as a *good usage long established?* Originating in corruption, its establishment is as yesterday; and it violates their most important institutions, as well as our own Charters. Should it nevertheless be contended, that, within the limits of the King's Courts at Madras, the Hindoo must now acquiesce in the exercise of the power in question, bound by the practice that has obtained, the difficulty will be to define it;—to declare the extent of the obligation, and to settle by what law the details of such power are to be governed.

To suppose, then, the case of a will by a Hindoo, setting aside the legal heirs, and every other claimant on the property of the testator, in favour of some artful Brahmin, possessing, and exercising an influence over him, in his dying moments, sufficient to induce him to *sign* such an instrument, and yet not sufficient, according to the cases in Westminster Hall, liable to be cited on such an occasion, to warrant the Court in rejecting it. The Hindu law contemplates the possibility of so monstrous an alienation, by deed, to take effect in the lifetime

(1) Menu, ch. I. p. 108.—Post, Append. to ch. iv. p. 181.

(2) Menu, ch. I. 110. 118.—Id. ch. VIII. 3. 41. 46.—1 Dig. 95. M. Sutputtee v. Indranund Jha; Beng. Rep. 1816, p. 512.

(3) 1 Dig. 337.

of the maker; denouncing him as insane, and declaring it null upon that ground; like the reasoning of the civil law, in the case of an in-officious testament. As the attempt, therefore, by a Hindoo, would be one which his own law, as in force to the Southward, would not tolerate for a moment, the best course would be to set such a will, if offered in judgment, entirely aside; as would probably be done even at Bengal, where the testamentary power is established.(1)

But, without going the length of total disherison, an alienation by means of a will may be attempted, far exceeding the legal power of a Hindoo testator; and rights may be trenched upon by it, which the Hindu law, as in force to the Southward, has been most anxious to guard. Indeed, it is almost of the essence of a testament that it should be so, more or less; according to an observation, frequently applied to a Hindu will, that if *contrary to Dharma Sastra*, it is invalid;—if *in conformity* with it, unnecessary.(2) Upon this principle, it has been the course of the Southern Pundits, to whom occasionally such wills have been referred, to try them by the provisions of the Hindu law, with respect to *gifts*, and *partition during the life of the father*, and to reform them accordingly; it being competent to a Hindoo to make a *gift*, to which it will be the duty of his heirs to give effect after his death;(3) as it is for him, if he so think proper, to *distribute* his property among them in his lifetime,

(1) 1 Bombay Rep. p. 67.
(2) Post, Append. to ch. xi. p. 421—E.
(3) Id. Append. to ch. xi. p. 422. 428. 431—437. 439.

thereby not defeating, but, on the contrary, affirming, and anticipating their right of inheritance.(1)

Should it be proposed, to discontinue the practice of recognising, in any respect whatever, an instrument purporting to be a will by a Hindoo, as being the exercise of a power unknown to their law,—unless executed at least with the formalities of a *deed of gift*, and of course carrying with it the consent of parties interested;(2)—or otherwise with those of a *partition of heritage*, subject also of course to the rules prescribed for that species of alienation;(3)—such would undoubtedly be, in a sensible degree, a corrective of the error that has been allowed to take partial root, liable perhaps to no material objection, other than the opening it would still leave for litigation, to try, upon the principle stated, if the will could, or could not be received; a propensity but too apt to be encouraged, and from which, expensive as its indulgence unavoidably is at our Presidencies, the Hindoo has a claim, by all fair means, to be protected.(4) This will best be done, in the instance in question, by allowing him the benefit of his own law, as reserved to him in our charters, in the important article of inheritance. But, if the use of wills, so far as they have been improperly permitted, be still to prevail among the Hindoos, in the extent to which the prac-

(1) Ante, ch. ix. p. 176.
Post. Append. to ch. xi. p. 427.—E.

(2) Sham Sing *v.* M. Umraotee; Beng. Rep. 1813, p. 394.

(3) Post, Append. to ch. xi. p. 435.

(4) See a curious passage, expressive of the horror of litigation, in a deed of compromise, between a party (a Hindoo) claiming by adoption, and the remote heirs; by which they agreed together to divide the property.—Sreenarain Rai *v.* Bhya Jha; Beng. Rep. 1812, p. 340.

tice of allowing them exists, (which to the Southward, it is believed, is only within the limits of the King's Courts,) it may be convenient to repeat succinctly the legal grounds, upon which alone they can, with any propriety, be continued and sustained.

In Bengal, Hindu wills seem to derive their support from the two following considerations: 1. Considered as a deed of gift, to take effect at a future time, on the demise of the donor; subject to all rules affecting gifts.(1) 2. That the dominion of the owner over his property is so far absolute, that any exercise of it whatever will be valid and irreversible *in point of law,* how objectionable soever the act, in *a moral* point of view. In the *Nuddea* case, (to be referred to more particularly in a subsequent page,(2)) an authority was cited, (that of *Govindo Nanda,*) reprobating, as absurd, the allowing to be valid, what had been forbidden to be done. The distinction however between acts *void,* on the ground of some legal disability in the person of him by whom they are performed, and acts *prohibited* only, on account of their inexpediency, is too firmly rooted in the doctrines of the school alluded to, to be now shaken. But, inasmuch as it is confined to those provinces, and not only not recognized, but disclaimed by the authorities prevailing to the Southward, the ground upon which alone the doctrine of wills can stand there, is very much narrowed. Admit that a Hindoo there may do by testament, what he could have done by partition among his sons,

(1) Post, Append. to ch. xi. p. 422 to 441.
(2) Post, p. 263.

or otherwise by donation; which is allowing all the force that can be given to such a will, by taking it as a *gift*, in regard to what the testator had power to give, or as a *partition*, in regard to what he might have distributed, but could not have given; the result would be,(1)

1. By way of admission, that a *separated* or sole owner of property, having no male descendants, nor other family, may dispose of it as he pleases.(2)

2. But that even a *sole* owner, in respect of *land*, whether hereditary or acquired, having a family, cannot, by any act, without their concurrence, deprive his sons of their legal shares, nor the rest of a sufficiency for their maintenance. And that, where there is no land, they must all be provided for, to that extent, out of his personalty.(3)

3. That, however different in this respect the law may be at Bengal;(4)—according to the doctrine of the Benares school, as prevalent to the Southward, a member of an undivided family must first obtain partition, before he can exercise individual ownership over his right in the joint property, without the consent of his coparceners; a gift of undivided property, without such consent, being regarded by the Mitacshara(5) as incompetent; at least so far as regards the *reality;* for, as to *moveables*, he ap-

(1) Ante, p. 17.
(2) Ante, p. 25. Post, Append. to ch. xi. p. 432. 435.
(3) Mit. on Inh. ch. I. sect. i. 27.
Sham Sing *v.* M. Umraotee; Beng. Rep. 1813, p. 395.
Menu, cited in 2 Dig. 112.
Sricrishna, note to Jim. Vah. ch. II. 26.
(4) Rajbhulub B. *v.* Mt. Buneta De; Beng. Rep. ante 1805, p. 48.
(5) Mit. on Inh. ch. I. sect. i. 30.

pears to be at liberty to make gifts on motives of natural affection, but not even with regard to these, to the extent of the whole of his property.(1)—Subject to this, the Smriti Chandrica declares, that restitution of a *prohibited* gift, as well as of a *void* one, shall be enforced by the Sovereign authority; the property not having been transferred, nor a new right vested. It is to be recollected, however, that separate acquisitions, by a member of an undivided family, so made as to render them exclusive, and impartible, are as much sole property, to all intents and purposes, as though the maker had been, at the time, divided, and separate.(2) And that, even with respect to *prohibited* gifts, they "may be valid, under the exceptions "which the law allows; such as distress, necessary sup-"port of the family, and pious uses, arising from indis-"pensable duties."(3)

In Bengal, where the power in question has been long exercised, opinions, carrying with them great weight, have not been wanting, that, supposing it to be *res integra*, not even there, according to the law of the Daya Bhaga of Jimuta Vahana,(4) (the ground-work of the law of inheritance in that part of India,) could a Hindoo, having sons, consistently with it, by any means, and of course not by *will*, (a mode of conveyance alike unknown to that work and to the Mitacshara,) be permitted to alien his real ancestral estate in land, without their consent. But the contrary having been, over and

(1) Mit. on Inh. ch. I. sect. i. § 27. 30.
(2) Ante, p. 213.
(3) Mit. on Inh. ch. I. sect. i. § 29.
(4) Jim. Vah. ch. II. § 23.

over again, determined, the point there is probably not now admitted to be debateable, whether in the Supreme Court, or in the *Sudder Dewanny Adawlut*.(1) A leading case to this purpose is one decided in the Supreme Court at Calcutta, about the year 1789,(2) where the testator, a Hindoo, the father of four sons, and possessed of property of both descriptions, a ne tral and self-acquired, having provided for his eldest by appointment, and advanced to the three younger ones in his life the means of their establishment, thought proper to leave the whole of what he possessed to his two younger ones, to the disherison of the two elder, of whom the second disputed the will; but it was established, on reference to the Pundits of the Court. Their answers were short; simply affirming the validity of the instrument, accord- to the *Shaster*. Now the *Shaster* knows no such instrument as a will. But, considered as a gift to the two younger sons, in exclusion of the two elder, the ground with the Pundits probably was (the Bengal maxim) that, however inconsistent the act with the ordinary rules of inheritance, and the legal pretensions of the parties, yet, *being done*, its validity was unquestionable. Sir Robert Chalmers, and Sir William Jones, being both on the bench at the time, concurred in this determination. About the same time occurred the *Nuddea* case, in appeal from a decree of the inferior Court at Kishnagur, heard and finally determined, in the *Sudder Dewanny*

(1) Post, Append. to ch. xi. p. 431. & seq.

(2) Russichlol Dutt and Hurnaul Dutt, Executors of the will of Modun Mohun Dutt *v.* Chortanchuru Dutt; Beng. Rep.

Adawlut, the grand Court of Appeal for the whole of the Bengal provinces.(1) It was the case of one of the great Zemindaries, of the country, which the testator, the Raja, having enjoyed during his life under the will of his father, to the exclusion of his three brothers, left by will to his son; against whom one of his uncles instituted a suit for the recovery of his fourth share, disputing the right of the grandfather, so to dispose of property that was ancestral. The question was discussed upon the will of the grandfather of the defendant, which appears to have been an assignment in trust, by way of gift to his eldest son, the elder brother of the plaintiff, in contemplation of death; providing to a certain degree for his other sons, but very inadequately, compared with what they would have been entitled to, had they been allowed to succeed to their legal shares. The latter of the two wills recited that the Zemindary *never had been divided;* but that, pursuant to the custom of the country, it had always been enjoyed by the eldest son;(2) in consideration of which the testator had left it to the defendant, being his eldest son, in the presence of the Brahmins of *Nuddea*, whom he had assembled to be witnesses of the gift. Accordingly, the defendant contended, independantly of the will, that the estate in question, according to the nature of it, was his, in right of inheritance; and it was proved in the cause, in point of fact, that it had always been enjoyed by one son, in ex-

(1) See a short Note of it in the Beng. Rep. ante 1805, p. 2, under the name of Eshandchund Rai v. Eshandchund Rai.—And see Append. to ch. xi. p. 417.

(2) Ante, p. 198. 236.—Post, p. 447.

clusion of the rest, though not uniformly by the eldest; but sometimes by the one deemed the fittest to manage a property of that description, pursuant to the spirit of the Hindu law in that respect.(1) The means resorted to by the Court of Appeal, for information as to the law, appears to have been as extensive as possible; references having been made, not only to numerous Pundits named by either party, but to the Pundits of the several Courts in the Provinces, as well as to those at the Presidency; among which latter was Jagannatha Turchapunchanana, the compiler of the Digest. And, though a great majority, including Jagannatha, were in favour of the acts of the two testators, upon the general ground of the competency of a Hindoo to dispose of his property as he pleases, without regard to the nature of it, whether ancestral or acquired, public or private, yet the Court, affirming the decree, which had been in favour of the defendant, expressly made the *nature* of the property, and the *course* in which it had always been enjoyed, *according to the custom of the country*, an ingredient in their determination; as may appear from the extract inserted in the Appendix.(2) It is to be remarked also in this case, that all the authorities cited and relied upon by the Pundits, in support of the title of the defendant, are, as was naturally to be expected, *Bengal* authorities; among which no mention is made of the Mitacshara, the Smriti Chandrica, or the Madhavya. Another thing to be remarked is, that the Court, not satisfied with the sum spe-

(1) Ante, p. 199.

(2) Post, Append. to ch. xi. p. 447.

cified in the former of the two wills, as a provision for the plaintiff, (being only 250 *rupees* per month,) took upon itself to increase it to 500, upon the ground, as the decree declares, "that the former sum was inadequate to his "situation and circumstances." This serves to shew that even, in Bengal, under the modern practice, the father of a family, according to his means, cannot leave it inadequately provided for, much less entirely destitute. The *Nuddea* case was followed by others to the same effect;(1) not, however, altogether without question. Among these may be noticed (in 1807,) that of the *Mullicks*, in the Supreme Court, a case also of importance in point of value, involving the right to above half a million sterling; in which six, out of eight sons, disputed the power of their father to dispose by will, to their prejudice, of such part of it as was ancestral, though they each took by it three *lacks of rupees*; but the Court, without referring to their Pundits, were in that respect unanimous in its favour, considering the point as already settled. In all these cases, however the other members of the family may have been left, the sons of the testator, where there existed any, were, more or less, provided for by him; and, where the provision made by him was deemed inadequate, the Court took upon itself to increase it. These are important facts, though not in favour of the testamentary power, as founded in legal right; and it is to be here remarked, that, where the case was to be governed by the law, as

(1) Rodhamunee D. *v.* Shamchundur; Beng. Rep. ante 1805.
Rankoomar *v.* Kishunker; Id. 1805, p.
Gungaram Bhaduree *v.* Kasheekaunt; Id. 1813, p. 363.

current in *Mithila*, the contrary of the cases last referred to was determined by the *Sudder Dewanny Adawlut* of Bengal,(1) after consulting their Pundits, who held an attempt to aliene family property as invalid, for want of seisin given in the life of the owner.

At Bombay, and its dependancies, whatever may be its practice, the law is the same as at Madras, and throughout its dependant territories.(2) That, at the latter Presidency, it neither knew, nor could endure the power exercised in this way by Hindoos, over their property, occurred early, in the discharge of his judicial function, to the author of this work.(3) With this impression, the Supreme Court there desisted after a time from granting probates of wills, in the case of *native* estates; the practice of granting which had been established in the Mayor's Court, and followed, during the short period of its existence, in that of the Recorder;—and, at length, in 1812, the question of a Hindu testament (which had been frequently *mooted*) was raised in an equity suit; in which the Bill, founded upon a claim under the will of a Hindoo, was dismissed, on the ground of the incompetency of the will, as a mode of conveyance. But, as the property disposed of by it was *undivided* property, a rehearing was allowed, in order to see whether it might not be sustainable, to the extent of the testator's share, at least with regard to such of it as had been acquired by himself; but the opinion of the court was not finally

(1) Sham Sing *v.* M. Umraotee; Beng. Rep. 1813, p. 395.
(2) Post, Append. to ch. xi. p. 449.
(3) See the case of Veerapermall P. *v.* Narrain P.; Notes of cases at Madras, vol. i. p. 78. Ed. 1827.

taken upon this more confined view of the subject;(1) nor did the question again occur, while the author continued to sit upon the Madras bench. Upon that occasion, however, according to his accustomed practice in like cases, he sought in all directions for that information; which, obtained, has enabled him, with proportioned confidence, to compose the present chapter, as well as so much of the first in particular, as regards the right of alienation. For how much of such information he is indebted to Mr. Colebrooke, will be seen in the Appendix. And, if the author shall not, by this work, have redeemed, in any degree, the debt which every man is said by my Lord Coke to owe to his profession, he will at least, by the Appendix to it, have conferred upon the public an inestimable obligation, in collecting, and communicating such a body of "Remarks" as it contains, upon the most important points of Hindu law, as connected with the subjects that will have been discussed; the largest proportion of them from the pen of him, whose learning in that abstruse science, drawn directly from original, and the most authentic sources, stands acknowledged in Europe, as well as in India; and which, great as it confessedly is, has, if possible, been surpassed, by the liberality with which it was imparted.(2)

(1) Post, Append. to ch. xi. p. 435. 439. 441. 452.

(2) Since the publication of the first edition of this work, the Supreme Court at Madras has sustained a will by a Hindoo, so far as the property conveyed by it, having been of the testator's acquirement, was bequeathed for the performance of religious ceremonies; considering it, even at that Presidency, to be too late to determine that a Hindoo cannot make a will: and holding the one in question not to be liable to be deemed void, on the ground of its being superstitious.—Ex relatione Sir Ralph Palmer, ch. I.

CHAP. XII.

ON CONTRACTS.

Hastening at length into port, after a sufficiently tedious and perplexed passage, through a sea hitherto but little explored,(1) it is not intended to dwell upon the subject of this, the concluding chapter, beyond what its exigency may seem indispensably to require. Not that it is not, in the circle of civil law, one of the greatest concern. Were it to be asked, what constitutes the subject of *Contracts?* it might with propriety be answered, "*quicquid agunt homines.*" Scarce a day passes with any man, who has any thing to do with the business of life, that he is not entering into, executing, or fulfilling one, of some kind or other. Their diversity is infinite; and the objects involved in them often vast, and most important. But, in the first place, they rest, for their formation and solution, upon principles so general, that they have been considered to belong to the law of nature, as manifested in the concurrent practice of civilized nations; and, therefore, in essentials, as common alike among all people. And, secondly, these principles, bottomed in reason and convenience, and inculcating universally the purest good faith, are to be found already so discussed in

(1) "The interminable, and troubled ocean (as it has been called) of Hindu law."—Practical Remarks on Principles of Mohammedan Law, by W. H. Macnaghten, Esq. p. xx.

innumerable treatises, that, excepting with some special view, the field is scarcely open. At the same time, they must be admitted to be a part of the law of nature, that is modified, more or less, every where, by local institutions and usage; and the British Charters having, moreover, directed, that as well with regard to matters of CONTRACT, as of INHERITANCE and SUCCESSION, where the question shall be between *Natives*, the *native law* shall determine, some attention to the *Hindu law of Contracts* would appear to be of course, in a work professing to embrace the elements of that law generally, with reference to British judicature. Referring, then, in particular, for more systematic views of the subject, to the celebrated treatise of M. Pothier, of Orleans, as translated and edited by a learned jurist, not long since deceased ;(1)—together with a still later one, so far as it goes, equally comprehensive, and more compact, by Mr. Colebrooke; (of which the introductory matter, with the continuation, remain as *desiderata*,)—it is to be seen, what is proposed to be done here. Of the Digest, of which, in the preceding chapters, such frequent use has been made, Successions and Contracts, being the professed subjects,—that of Contracts is made to occupy nearly one half of the whole. But the compiler has included, with a large proportion of irrelevant matter, some, not in general classed under this title; as, for instance, not only *marriage*, but the numerous and various duties to which it gives birth. That marriage is a contract; and that the Courts are bound to administer to parties the law of their faith under this

(1) Mr. (afterwards Sir W.) Evans, late Recorder of Bombay.

head, is unquestionable. But the scheme of this work has already included it, with every consideration that it involves, under a different distribution; nor, considering how little it has been admired, is it intended, as to what remains, to follow the arrangement either of the Digest, or of Menu; but to adopt one more consonant perhaps to our own notions; by collecting into one point of view, the most material observations, as applicable to Contracts in general; and then considering the most usual sorts, in the order in which they may naturally present themselves; confining the statement to such points, connected with the subject, as are either *peculiar* to the Hindu law,—or, with regard to which, it may, from their nature, be satisfactory to see, how far it is, with reference to them, *coincident with our own.*

I. *Intention*, and *consent*, being the soul of every agreement, the Hindu law has evinced great care, that the *mind* of the parties shall be in a condition at the time, to be capable of contracting.(1) Hence, the ordinary disqualifications of minority, lunacy, and idiotcy, prominent in every code of law, occur in this:(2) in which the competency of the lunatic, during a lucid interval, is admitted.(3) With the *insane* person is classed, for this purpose, one intoxicated, or incapable through extreme disease;(4) and the case of minority is construed to comprehend that of

(1) Menu, ch. VIII. 168.
(2) Menu, ch. VIII. 163.
Yajnyawalcya, 2 Dig. 193.—2 Bombay R. p. 114.
(3) 2 Dig. 193.
(4) Menu, ch. VIII. 163.—2 Dig. 191, 192.

decrepit old age;[1] the party, in all these cases, being considered to be *non sui juris;* and, in all of them, the contract, so effected, declared by Menu to be utterly null.[2] Upon the same principle, the law watches the influence on the mind of the various passions, by which it is apt to be disturbed; as of fear, anger, lust, and grief; holding as not done, any thing done by one, while so agitated.[3] These disqualifications are chiefly expatiated upon, under the law of *gifts*,[4] to which the law of *contracts* refers; the same causes being regarded as productive of the same invalidating effects, in the one case, as in the other.[5] A distinction, however, is to be attended to between those that operate as a *bar*, such as idiotcy, or lunacy; and those, in which an account may be taken of concurrent circumstances, toward assisting to determine, how far the imputed disability is to be sustained, in order to justify the *nullity* contended for. The case of an agreement, for instance, under the circumstance of inebriation, is one, in which the English and the Hindu law will alike balance, in coming to a conclusion.[6] And the remark may apply to more of the questionable ones that have been specified; so as to afford ground to discriminate between contracts, so circumstancced, as not to be capable of standing in-

(1) 2 Dig. 187.

(2) Menu, ch. VIII. 163.

(3) Nareda, 2 Dig. 181, 182.—Yajnyawalcya, 2 Dig. 193. Catyayana and Vrihaspati.—2 Dig. 197.—Gautama, Id. 200.

(4) 2 Dig. 181.

(5) 2 Dig. 328.

(6) 2 Dig. 328.

quiry for a moment, and such as only require to be subjected to a very strict one, before they are allowed. In a system, in which men are protected against their own acts occasioned through *fear*, it follows that *force*, constraining the will, can never be allowed to attain its end; and, in none, is *fraud detected* less permitted to succeed. Nor is advantage to be taken of what was *not seriously meant*. "A true assent (says a learned writer "on the universal, including the Hindu law of the subject) implies a serious, and perfectly free use of power, "both physical and moral. This essential (he adds) is "wanting to promises made in jest, or compliment; or "made in earnest, but under mistake; or under deception or delusion; or in consequence of compulsion. "Therefore, consent (he concludes) not seriously given, "or conceded through error,—extorted by force, or procured through fraud, is unavailable."(1) And, so well is the whole of this summed up by Jagannatha, according to the express doctrine of the Hindu law, that, not to give, at length, in his own words, the passage alluded to, were an injury to the purpose of the present chapter. Commenting upon a text of Nareda, "where an "owner (says he) discriminating what may, and may not "be done, and guided solely by his own will, declares, as "is actually intended by him, his own property divested, "and dominion vested in a person capable of receiving, and designed by the donor, over the thing meant "to be given,—such volition vests property in the donee. "In cases of fear and compulsion, the man is not

(1) Colebrooke, on Obligations, &c. p. 45.

"guided solely by his own will, but solely by the will of "another. In the case of a man agitated by anger, or "the like, he is not a person who discriminates between "what may, and may not be done. If, terrified by "another, he give his whole estate to any person, for "relieving him from apprehensions, his mind is not in "its natural state;—but, after recovering tranquillity, "if he give any thing in the form of a recompense, the "donation is valid. What is given as a bribe, or in "jest, is a mere delivery, or a gift in words only; there "is no volition, vesting property in another. As for "what is given by mistake, as gold, instead of silver, "which should have been given, or any thing delivered "to a Sudra instead of a Brahmin, the gold and the "Sudra are not the *thing* and the *person* intended, "namely, silver and a Brahmin. Though it be ascer-"tained that ten *suvernas* should be paid, if any how, "through inattention or the like, fifteen *suvernas* be de-"livered, the gift is not valid; for they are not what "was really intended to be given."(1)

Not only must the mind of the parties be in a legal state to contract, but the subject, or cause of their contracting, must be a competent one, according to the apprehension of the law. The provision, with regard to this, consists principally in *negatives;* and here recourse may be had to what was delivered from the Bench, some century ago, by one of the Judges of England, in a strain of eloquent indignation, worthy at once his seat, and the

(1) 2 Dig. 183.

occasion;—"This (said he) is a contract to tempt a man "to transgress the law;—to do that which is injurious to "the community; it is void by the common law; and the "reason why the common law says such contracts are "void, is, for the public good. You shall not stipulate "for iniquity. All writers upon our law agree in this; "—no polluted hand shall touch the pure fountain of "justice.—*Procul o! procul este profani!*"(1)—with more to the same effect; for all which, (noble as it is!) the Hindu, as well as the common law of England, would have supplied him with abundant authorities, had he (the eminent person alluded to) been at the time adjudicating among, and between Hindoos.(2) Speaking of a bribe,(3) to give evidence, though true, or for subornation,(4) (being one instance of the *turpis causa*,)—"It "shall, by no means, be given, (says Catyayana,) though "the consideration be performed; and, he adds, if it "had been at first actually given, it shall be restored;" thinking, it seems, as has been thought by some of our own sages, that it is more consonant to the principles of sound policy, and justice, that, wherever money has been paid on an illegal consideration, it shall be recovered back again, by the party who improperly paid it, than, by denying the remedy, to give effect to the illegal contract.(5) As, whatever is given for an illegal act may be

(1) Post, Append. to ch. XII. p. 454.

(2) Ch. Justice Willes; in Collins v. Blantern, 2 Wils. 347.

(3) 2 Dig. 195.

(4) 2 Dig. 196.

(5) Lacaussade v. White. 7 Term Rep. p. 535.

taken back, so, in the case of a good consideration, if unperformed, the contract fails.( )

To consider next the case of the *wife*, and other dependant members of a man's family, with reference to the power in question of contracting. And, as respects the wife, it may be taken to be commensurate with her right of property, as consisting in her *Stridhana*,(2) *land* excepted; the exception applying, in the Bengal provinces, only to such as may have been given her by her husband, of which she certainly cannot *dispose*, and with regard to which it follows, that she cannot *contract*.(3) Beyond this, it is laid down, very generally, in many places, that for *necessaries*, in support of the family, including herself, she may bind her husband by her contracts;(4) as a man's slave even has power to do, according to Menu.(5) The case usually put, is that of the *absence of the husband from home*;(6) when it is but reasonable, that, while it continues, an authority should subsist somewhere, to provide for his family.(7) It is in the *absence of his master*, that Menu confers this right upon the slave. But, absence, in these texts, is construed to be illustrative only;(8) and, accordingly, Catyayana extends it to disability in the husband to act, arising from

(1) Nareda, 2 Dig. 181.—Vrihaspati, Id. 198.
Menu, ch. VIII. 212, 213.—2 Dig. 172.
(2) 2 Dig. 129, 130.—Ante, p. 26.
(3) Ante, p. 27.
(4) Nareda, 1 Dig. 295.—Vishnu, Id.—Catyayana, Id. 296.
(5) Menu, ch. VIII. 167.—Daya Crama Sangraha. ch. XII. 1.
(6) Catyayana, 1 Dig. 17.
(7) Nareda, 1 Dig. 313.—Post, Append. to ch. XII. p. 458.
(8) 1 Dig. 298. 320.

whatever cause;[1] as, for instance, from incurable disease;—including, among necessaries, for which provision may be made at his expense by others, the nuptials of his daughter, or disbursements for funeral rites.[2] And all this (he says) may be done by his servant, his wife, his mother, his pupil, or his son,—*without his assent;* though, in another text, he supposes his assent to have been given;—unnecessarily, as the law would imply it:[3] but such implication may be rebutted, by proof of his having withheld it, or otherwise; in which case, there could be no recovery against him, though it should appear that he had left his family destitute.[4] In certain trades, in which the wife is understood to have a special concern, she has a greater latitude;[5] and, universally, in proportion as the management of the family is confided to her, he is bound by her contracts.[6] To what extent and under what circumstances, an undivided family generally is bound by the engagement of any one, particularly of him who is the managing parcener, has already been seen, in treating on coparcenary.[7]

The Hindu law, in no instance, requires that a contract should be in writing; though it sets, upon all occasions, a due value upon written evidence.[8] It admits the benefit of one to be assigned, according to Jagannatha,

(1) 1 Dig. 296.
(2) 1 Dig. 296.
(3) Catyayana, 1 Dig. 17.—Id. 219, 220. Post, Append. to ch. XII. p. 456.
(4) 1 Dig. 298, 299.—Post, Append. to ch. XII. p. 460.
(5) Yajnyawalcya, Vribaspati, Nareda, 1 Dig. 318.
(6) 1 Dig. 318, 319.
(7) Ante, ch. IX. p. 199.
(8) 1 Dig. 19, et seq.—Id. 393, et seq.

and the reason of the thing; though it is remarkable, that, under the head of assignment, he cites no authority. (1) And, as an excessive, or illegal gift may be resumed, (the retraction of gifts being an express title of law, (2)) so may contracts, be rescinded; the law, in the one case, and in the other, nearly identifying, (3) as has been already remarked. (4)

II. Having thus, with reference to Hindu materials, considered the leading points, as regarding contracts generally, particular ones come next to be discussed, under the following heads, viz. 1. Of *bailment;* 2. of *loans;* 3. of *sale* or *exchange;* 4. of *debt.*—1. The contract of bailment claims particular attention, from its comprehensiveness, as well as its importance: being, in a simple, and general point of view, a contract only to return in due time what the owner has confided to the bailee, under a responsibility suited to its specific nature; with a view to which a certain degree of care is virtually stipulated; the extent varying with the object of the bailment, and constituting, for the most part, the point to be adjusted, in every case, in which a question upon the subject can arise. And, so nice a one is it often, that, from the difficulty of definition, authority has not been wanting for referring it universally to the discretion of the judge. (5) The degree depends, in the first instance, upon whether the benefit,

(1) 1 Dig. 90.—Id. 189, et seq.
(2) Menu, ch. VIII. 4. 212, 213.—2 Dig. 170.
(3) 2 Dig. 328.
(4) Ante, p. 19.
(5) Essay on the Law of Bailments, p. 25.

resulting from the bailment, be reciprocal between the parties; and, if not, to which of them it attaches; which is, in general, sufficiently obvious. Familiar as the subject must be, in every system of law, provisions regarding it abound in Menu, and other text-writers among the Hindoos; and, admitting them (as has been remarked (1)) to be consonant to the principles established elsewhere, on the same subject, the agreement can scarcely be classed with that "*identity* of conclusions, which, in proportion as the subject is not of technical institution, "pure, unbiassed reason, in all ages, and nations, seldom fails to draw." (2) With regard to our own juridical system, confessedly the most material, if not the whole of the principles alluded to, have been imported into it, through Bracton, from the Romans. With us, therefore, there has been in this instance, no *such identity of conclusion drawn;* all has been derivation; nor can it be reasonably doubted that, with the Hindu law, have originated (as far as we can see) those provisions, applicable to the subject in question, which the wisdom of "ages and nations" the most civilized, has since been content to adopt. Of these, the standard, founded in the care that every prudent man takes of his own property, (3) remarkable as it is, is as old at least as Vrihaspati; who charges with the value, adding interest, "the bailee, that suffers a thing bailed to "be destroyed by his negligence, while he keeps his own "goods with very different care." (4) On the other hand,

(1) Essay on the Law of Bailments, p. 116.
(2) Id. p. 114.
(3) Id. p. 6.
(4) 1 Dig. 429. 411.

"if a thing deposited be lost, together with the goods of the "bailee, it is declared by various authorities, to be lost to "the *bailor*;"(1)—and numerous texts on the subject of responsibility, contain the equally remarkable exception, (not of inevitable necessity, but, in identical terms,) of "*the act of God*, or of *the King*."(2)

Hindu writers differ in their division of bailments; some enumerating four;(3) others six;(4) Sir William Jones acknowledging only five.(5) Not to multiply them, (as he says,) inconveniently, by extending inquiry to every possible case, in which a man possesses for a time the goods of another, the most important ones, as they occur in the Hindu law, (from whence, it is plain, they have been derived into other codes,) may be distributed, according to the principle that governs their responsibility; this depends upon the object and benefit involved; which may be entirely on the side of the *bailor*,—or on that of the *bailee*; or it may be *mutual*. Thus the *simple deposit*, together with the *commission without reward*, are, for the sake, and enure to the sole advantage, of the *owner* of the thing bailed.—In *loans for use*, it is the *bailee*, or borrower, that is alone benefitted. In the remaining cases of *mutual trusts*, *pledges*, and the various kinds of *hiring*, both parties have an interest.

(1) 1 Dig. 420, 421.

(2) Nareda, 1 Dig. 420.
Vrihaspati, and Catyayana, Id. 421. 423. 427.
Yajnyawalcya, Id. 422. 430.

(3) Yajnyawalcya, 1 Dig. 407.

(4) Nareda, 1 Dig. 408.

(5) Essay on the Law of Bailments, p. 35.

To consider the matter, then, under this triple point of view, beginning with the principle, where the bailment is for the benefit of the bailor, applicable to deposits, and mandates, or commissions without rewards; and, first, of deposits; by which he, who accepts one, is charged with the property of another, without any consideration on the part of the owner; while, on that of the depositary, all is trouble and care. *Subject to any special undertaking*,(1) the law would be unreasonable, that would exact from such a bailee, in point of responsibility, more than the absence of such gross negligence, as must ever be regarded as inconsistent with any kind of engagement. The obligation to *restore* a deposit, is provided for by *Menu;* who requires that, "as the bailment was, "so should be the re-delivery, according to a rule in "the Veda."(2) Or, as it is expressed by another authority, "the very thing bailed must be restored, to the very "man who bailed it, in the very manner in which it was "bailed."(3) According to which, the defence set up by Demosthenes, for a client of his, sued in an action to recover a deposit, must have prevailed at Benares, as we are told it did at Athens;—the action having been brought by two only, out of three who had been concerned in the bailment, Demosthenes insisted (it seems) *that his client could not legally restore the deposit, unless all three proprietors were ready to receive it*.(4) Not controverting this, nor questioning the precision of Vrihaspati, a deli-

(1) Jagannatha, 2 Dig. 340.

(2) Menu, ch. VIII. 180. 194, 195.—Nareda, 1 Dig. 413.

(3) Vrihaspati, 1 Dig. 415.—2 Id. 139.

(4) Essay on the Law of Bailments, p. 51.

very *substantially* good, would be valid, under a system, that gives effect, upon all occasions, to the *reason* of the law, as opposed to the *letter*, if not carried to excess.(1)—Due caution being inculcated in the selection of a depositary,(2) a deposit is one of those things, which, bringing with it nothing but responsibility, a prudent man, in the opinion of Vrihaspati, would not receive; but, if he do receive it, he requires him *to keep it with care*, restoring it on a single demand.(3) Nor is the Hindu law surpassed by any, in the earnestness with which it exacts from every bailee, together with suitable care, the most perfect fidelity, denouncing as criminal, and punishable accordingly, him, who alienes a deposit without permission, uses it without consent, or neglects to preserve it;(4)—insomuch that, as at Rome, so among the Hindoos, the violation of one, in some instances, involves infamy.(5) One criterion, exonerating the bailee, is, if, with the goods bailed to him, his own have been lost; in which case, it is held, that the loss is the bailor's, though it should not have happened by any act (as it is called) of God, of the king, or of robbers;(6) the presumption, in all these cases, being against every thing like fault;

(1) 1 Dig. 419.—Vrihaspati, 2 Dig. 128. 153.
Yajnyawalcya, 2 Dig. 570, note.—3 Id. 25. 29.

(2) Menu, ch. VIII. 179.—1 Dig. 411.
Essay on the Law of Bailments, p. 46.

(3) 1 Dig. 416.

(4) Vrihaspati, 1 Dig. 416, 417. 412. 426.
Menu, ch. VIII. 191, 192.—1 Dig. 432, et seq.

(5) Vrihaspati, 4.—1 Dig. 416, 417.

(6) Nareda, 1 Dig. 420.
Vrihaspati and Catyayana, Id. 421.—Yajnyawalcya, Id. 422.
Essay on the Law of Bailments, p. 47.

while the rule is, that he is to make good the deposit, "if "in fault, and not unless he be in fault."(1) But, it does not follow, though none of his own property have been lost, that he is to be necessarily answerable, if the deposit, having been kept with care, be lost notwithstanding; unless it can be shewn, that he have kept his own with very different care; disregarding the thing deposited, as being another's property, while he secures his own;(2) much more, if he have appropriated any part of it.(3) And here it may be observed, that, where collusion is not imputable, robbery always by the Hindu law, in opposition to theft, implies a degree of violence, against which no bailee whatever, not specially undertaking, is held to contract; whereas, if a loss happen by thieves, the distinction exists, and a bailee, even without reward, may be chargeable, where such a want of due care can be shewn, as must be taken to have led to spoliation, be it of whatever kind.(4) On the other hand, if the *dépot* that has been resorted to by the owner of the goods, be confessedly an exposed one, of which he has notice, it is his own fault, if he trust it, and they are lost, or injured, by a peril, to which, in the nature of the thing they would be liable.(5) In the case of a sealed deposit, the Hindu law accords with what (it seems) was considered to be the better opinion, in the contest that existed on the point, among

(1) Jagannatha, 1 Dig. 421.—Cátyayana, Id. 423.
(2) Vribaspati, 1 Dig. 429.—Id. 421.
Essay on the Law of Bailments, p. 47. 67.
(3) Menu, ch. VIII. 189.—1 Dig. 422.
(4) 1 Dig. 423. 429.
(5) Vribaspati, 1 Dig. 404. 423.—Catyayana, Id. 424.

the lawyers of Rome, namely, that the depositary "would "only be obliged to restore the casket as it was delivered, "without being responsible for the contents;"( )—Menu having in like manner declared, that, in such case, "the "bailee shall incur no censure on the *re*-delivery, unless "he have altered the seal, or taken out something."[2] Though inevitable necessity must, in general, excuse, it will not, if the thing, having been previously demanded, was not restored in time; or if it had been used by the bailee, contrary to the faith of the bailment;—in either of which cases, he so far makes it his own, that the loss, if it happen, becomes his, from whatever cause it have proceeded.[3] Though the heaviest punishment be denounced against him, who, by false pretences, gets into his hands the goods of another,[4] yet is such a proceeding justified, in the case of a creditor, who cannot, by ordinary means, obtain payment of his debts;—as is, also, the retaining, under similar circumstances, what has been regularly deposited.[5]—It is called *legal deceit;* available among a people, with whom not *deceit* only, but *force* is allowed to be resorted to, whether for the securing of rights, or the discovery of truth.[6]

Between the *depositary*, and the *mandatary*, or him who, without expectation of reward, engages to execute

(1) Essay on the Law of Bailments, p. 39.

(2) Menu, ch. VIII. p. 188.

(3) Vrihaspati, 1 Dig. 426.—Yajnyawalcya, Id. 430. Nareda, Id. 431.

(4) Menu, ch. VIII. 193.—1 Dig. 433.

(5) Vrihaspati, 1 Dig. 341.

(6) Menu, ch. VIII. 48, 49. 182. 1 Dig. 196. 437.—Vrihaspati, Id. 439, et seq.

for another a commission of any kind, the difference consists in the diligence, added to the care, for which, to a certain extent, the latter is pledged, according to the subject matter of the mandate;(1)—insomuch that Grotius considers the *deposit* as a division of the *mandate;* "car "(to use the words of his French translator) le depositaire "*donne ses soins* à la garde de la chose deposée entre ses "mains;" (2) as the mandatary gives his, in the execution of what is committed to him. Upon the principles of the Hindu law also, the responsibility is the same, in the one case, as in the other, so far as regards care, with the contingencies to which things so bailed may be liable; the benefit, in either case, being exclusively his, to whom the article belongs;(3)—since, in a system, that mixes continually moral dictate, with legislative enactment, it never could be intended to attach legal effect to the position, that "to him who attends cattle as a favour, even "the favour *conferred by him* is his *hire.*"(4)

Should it be objected, as hard, in the case of these two sorts of bailees, *receiving nothing*, that they should be responsible eventually for losses, the answer is, that reasonable care, as well as perfect fidelity, are of the essence of the confidence reposed; and, as Jagannatha says, the engagement should not be entered into, "by a person not disposed to an act of duty, or amity."(5)

Vrihaspati (as has been observed) discourages the ac-

(1) Essay on the Law of Bailments, p. 23.
(2) L. 1. ch. XII. § 2. Barbeyrac's edit.
(3) Catyayana, 1 Dig. 405, 406.—Yajnyawalcya, Id. 407.
(4) 2 Dig. 340.
(5) 1 Dig. 417.—Essay on the Law of Bailments, p. 42.

ceptance of a deposit, as unworthy a prudent man.(1) This is not generous. And, unless his employment of it, as a mean to *deceive heirs*,(2) receive the most favourable construction, such a purpose is far from commendable.— But it belongs to the noble office of the judge, to discountenance and disappoint all *covert* acts, practised to the prejudice of others' rights; nor can Vrihaspati (though said to have been profoundly versed in the law) (3) be ever quoted, with effect, in their support, whether in a Hindoo, or in a British Court, administering justice upon Hindu principles; so long as attention shall be paid to the declaration, by the highest Hindu authority, that "when "the judge discovers a fraudulent pledge, or sale;—a "fraudulent gift or acceptance; or, in whatever other "case he detects fraud, he is to *annul* the whole trans-"action."(4)

The next bailment to be considered is that of *loans for use*, in contradistinction to loans of money, or other things, for *consumption*, which are contracts of a different nature; loans for use being for the sole benefit of the bailee, as in those just disposed of, the advantage is entirely on the side of the bailor. Exacting accordingly from the bailee, as the bailment in question does, extraordinary care, he is answerable for slight negligence, though not for inevitable accident or irresistible force. But, if the accident might have been avoided by reasonable care, or the force fairly resisted, the borrower must be

(1) 1 Dig. 416.
2 Dig. 404. 413. 419.
(2) 2 Dig. 139.
(3) Menu, ch. VIII. 165.

answerable, if the thing lent to him be lost; much more, if he have exposed it to loss, by his improvidence.(1) So, if it be lost, after the expiration of the period, for which it was borrowed, the loss becomes the borrower's: and he must answer it to the lender with an equivalent, having been *in morá*, as the Romans called it,—the law of deposits applying, in this respect, *a fortiori*, to loans for use.(2) On the other hand, the possession of the borrower is so far commensurate with the object of the loan, that the lender is not to determine it at will, unless some pressing and indispensable purpose of his own would be in danger of failing, if he did not get back, at the moment desired, the thing lent.(3) Like all other bailments, the one in question stipulates for the purest good faith; and, therefore, where a special use is in the contemplation of the borrower, at the time of borrowing, as if it were his intention to send the thing borrowed into another province, he should disclose it, if he wishes to be safe,(4) the danger to the property lent being eventually increased by such a purpose; as, upon loans for interest, a higher than the legal rate may be exacted, where the borrower is to cross the *Sindhu*, to penetrate dangerous forests, or traverse the ocean: (5)—precautions, that are consistent with the liberal requisition of the law, in the instance in question;—namely, that in "causes concerning a de-

(1) Nareda, 1 Dig. 420.—Vrihaspati, Id. 429. Essay on the Law of Bailments, p. 68.

(2) Catyayana, 1 Dig. 436, 437. 446.—Matsya Purana, Id. 445. 2 Dig. 98.—Essay on the Law of Bailments, p. 70.

(3) Catyayana, 1 Dig. 438.—Essay on the Law of Bailments, p. 67.

(4) 1 Dig. 439.

(5) 1 Dig. 46. 72. 80. Essay on the Law of Bailments, p. 68.

"posit, or a friendly loan for use, the king is to decide "them, without shewing rigour to the depositary;"— against whom, on the contrary, "his honest disposition "being ascertained, the judge is to proceed with mild- "ness."(1)

Having discussed those bailments, where the benefit is all *on one side*, the remaining class is that of those where it is *reciprocal*. Such are *mutual trusts*, *pledges*, and the various kinds of *hiring*; of each of which in their order.

Mutual trusts, as referable to the law of bailments, subsist specifically, where reciprocal deposits, loans, or the like, are made between two or more parties; which, whether they be partners in trade, coparceners, or persons no otherwise connected than by the transaction in question, it is plain must be governed by the rules that have been, or are yet to be stated; only with a *reciprocal*, instead of a *single* application.(2)

The law of *pledges* requires a more detailed consideration; the rules concerning them being chiefly deducible from the relative interest resulting from them to the debtor and creditor, as establishing credit on the one hand, and securing payment of a debt on the other. A pledge is an accessory contract, being a bailment of something to the creditor, on a loan of money; which, by the Hindu law, may be for security only, or for security joined with use;(3) and, in this respect, it may be compared with the *Vivum vadium*, and the *mortuum va-*

(1) Menu, ch. VIII. 196. 187.—Essay on the Law of Bailments, p. 30.

(2) Nareda, 1 Dig. 408.—Id. 410.—Menu, Id. 415.
Essay on the Law of Bailments, p. 82.

(3) Post, Append. to ch. XII. p. 463.

dium;—the *living*, and the *mort*-gage, in ours.(1)—But, though this be in general so, and though, to ensure the efficacy of a pledge or mortgage, the Hindu law inculcates the necessity of possession,(2) the authorities to this purpose are not applicable to a sort of mortgage, much in use in Hindustan, and the provinces subject to Bombay, termed *Drishta bandhaca;* by which (according to the usual course of mortgages with us) the pledge is assigned to the creditor as a security without possession, or intention of possession, till the stipulated time arrive;(3) so that it may be doubted, whether this mode of pledging be not originally Hindu, instead of Attick, as has been supposed.(4)—In the case of a pledge for use, the debt and interest being extinguished by the use, or otherwise, it reverts to him who made it; on the other hand, any part of the debt remaining, upon expiration of the time for payment, the pledgee, or creditor, may continue to use it, making a demand for payment, and giving notice of his intention to the debtor, or his representative; or, if it be a pledge for *security* only, he may, under the like circumstances, begin to use it, if capable of use, without injury to the substance, giving like notice; while an unjustifiable use of one, being a violation of an implied agreement, works a forfeiture of interest.(5) In

(1) Post, Append. to ch. XII. p. 461, 470.

(2) Vyasa and Vrihaspati, 1 Dig. 205.—Post, Append to ch. XII. p. 465—467.—C. 2 Bombay R. p. 130.

(3) Post, Append. to ch. XII. p. 467. 469.

(4) By Sir William Jones. See Essay on the Law of Bailments, p. 84. Catyayana, 1 Dig. 209, et seq.

(5) Menu, ch. VIII. 144. 150.—Vishnu, 1 Dig. 135. 144. Yajnyawalcya, Id. 145. 147.—Vribaspati, Id. 149, et seq. Vyasa, Id. 186.—Smriti, Id. 197, 198, et seq.—Catyayana, Id. 200.

either case, he may, by proper application, attach the article, so as to have it sold for his benefit; an account of what is due upon it being previously taken; the excess, if any, upon the sale, to be paid into Court, for the benefit of the owner.(1) And, on this ground it is, that a pledge should, in the judgment of Hindu lawyers, be always taken, where a loan is made to a kinsman, or a friend, against whom compulsory payment cannot be so conveniently enforced.(2) So, in the absence of the creditor, and no one on the spot to represent him, the debtor may redeem his pledge, by paying into Court what is due upon it.—By usage, contrary perhaps to the strict letter of the law, a pledge is assignable; but the assignment (which can only be for an equal, or less sum, than the sum advanced upon it) should correspond with the original contract; from which any variation might embarrass the redemption, on the part of the owner, by whom it was first pledged.(3) But a pledge by the owner, of the same thing, at the same time, to two different persons, for the full value to each, is fraudulent and punishable: and, as between the different pledgees, the first hypothecation prevails, subject to priority of possession; or there may be an equitable adjustment of the right, according to circumstances.(4) As effects bailed cannot be legally aliened by the bailee,(5) so is the law

(1) 1 Dig. 197 to 202.
(2) Vrihaspati, 2 Dig. 69.—1 Id. 18.
(3) Menu, ch. VIII. 143.—1 Dig. 189 to 192.—Id. 20.
(4) Catyayana, 1 Dig. 209.—Id. 211.—Smriti, Id. 213, et seq. Yajnyawalcya, id. 476.
(5) Dacsha, 2 Dig. 210.—Id. 152.

justly jealous of such an attempt on the part of the owner of property bailed, while the interest of the bailee in it continues; as in the case of a pledge. It is agreed, that a purchaser, being privy to the article being in mortgage at the time, the transfer would not avail him. It is farther admitted, that it may be restrained by injunction, upon timely application to the Court; and the result of a good deal of dubious discussion on the point is, that to render it valid, in favour of the alienee, he should see the thing for which he treats; and not only have reason to be satisfied, that it is unencumbered, but obtain immediate possession; from all which it may be collected, that a clandestine disposal by the owner, to a third person, of a thing already pledged to another for an existing debt, (like the case, with us, of a second irregular mortgage,) can scarcely take effect, unless (contrary to the general policy of the Hindu law) the creditor have improvidently allowed the pledge to remain in the hands of his debtor;(1) conformably with the declaration of Yajnyawalcya, viz. that, in other contested matters, the latest act shall prevail; but that, in the case of a pledge, a gift, or a sale, the prior contract has the greatest force;(2) —as also with the observation of Jagannatha, that, were it otherwise, "no man would make a loan, apprehending "that the debtor would sell to another, what he had "already pledged;"(3)—thus distinguishing between a *pledge*, and a *deposit for safe custody;* which latter, as

(1) 2 Dig. 146.
(2) 1 Dig. 476.
(3) 2 Dig. 147.

he remarks, has little comparative force, and may be at any time recalled by the owner.(1)—Prescription runs in other cases; titles being gained by long possession, and lost by silent neglect.(2) But his property in a pledge is never lost to the owner, by any lapse of time, while it remains, as such, out of possession;(3) but, on the contrary, it must be faithfully preserved for restitution to him by the creditor; who will be bound to indemnify his debtor, for any damage it may sustain in his hands, through want of due care; the debtor, in the event of loss, not attributable to the creditor, being bound to replace, or make it good: the debt, for which it was given, with the interest running upon it, remaining payable notwithstanding.(4) A slave being pledged,(5) the law protects him, in the hands of the pledgee, from insult; and much more from blows, *struck on a sensible part*.(6)

The last bailment to be considered, as productive of mutual benefit, is that of *hiring*, which is of various sorts, corresponding with others, where the benefit is not mutual, but on one side only. For as there may be a *loan*, so there may be a *hiring* for *use;* and, as a man may agree to execute a commission gratuitously, so, may

(1) 2 Dig. 147, 148.

(2) Menu, ch. VIII. 147, 148.—1 Dig. 214.
Yajnyawalcya, Id. 135.

(3) Menu, ch. VIII. 145. 149.—Yajnyawalcya, 1 Dig. 185.

(4) See the texts in the Digest, with the Commentary upon them, vol. i. p. 144 to 165.

(5) Ante, ch. V. p. 119.

(6) Catyayana, 1 Dig. 153. 159.
Lord Holt, as cited in the Essay on the Law of Bailments, p. 76.

the like service be undertaken for a reward, or adequate compensation; which is always implied in hiring. And, as a commission either to do something about a thing bailed, or simply to deliver it to another, may be without consideration, (*anwahita*,) ([1]) in the same manner, a workman, or artist of any description, may hire out his labour or skill; or, he may engage himself for pay, as a *common carrier*. So that the main difference between the bailments that have been already discussed, where the consideration is all on one side, and *hiring*, in its various branches, is, that, in the latter, it is *reciprocal;* the owner of the thing hired, or the hirer of himself, for whatever purpose, being paid, in the one case, for the use of his *property*,—in the other, for that of *himself;* while he who contracts for the particular thing, or service, derives a correspondent benefit from the temporary use of what he so hires. And, upon this reciprocity turns the responsibility, which the bailment in question stipulates. Such being the general principle, it is to be seen how it is applied in the Hindu law.

"Wherever (says Jagannatha) the property of one "person is, for some cause, delivered into the hands of "another, for safe custody, the rules declared in regard "to *deposits* are to be applied: therefore the law of "bailments (he adds) applies to a carriage, and the like "*received on hire:* and so, in the case of a person "*delivered* by the king, or the like, into the hands

(1) 1 Dig. 405. 407.

"of a guardian;"(1)—the meaning of which must be construed to be, that it applies *a fortiori* to the case of hire, which, as it is for the benefit of *both* parties, cannot but be taken to impose a greater responsibility on the bailee, than where the bailment is altogether for the sake, and on account of him, by whom it is made. Nor is Jagannatha singular in appearing "to make no "difference in this respect between a keeper of goods "for hire, and a simple depositary;" the same generality, on the same occasion, occurring in an author of our own;(2) but, that the degree is to be estimated by the peculiar nature of the bailment, is sufficiently plain, from the declaration of Nareda, that "whatever "(of things *hired* for a time, at a settled price) be broken "or lost, he (the *hirer)* shall make good, except in "the case of *inevitable accident, or irresistible force.*"(3) It may be here noticed, that, if a man build a house, on ground which he has rented, he has a right, on the expiration of his lease, to take with him the thatch, the wood, and the bricks, of which it is constructed,() contrary to the maxim of the English law, *cujus est solum, ejus est usque ad cœlum;* from which, modern decisions, proceeding upon equitable principles, have been gradually departing, in favour of lessees for years.

To proceed to that branch of hiring, which consists in the converting of the material bailed, into an article of use;—India has ever been celebrated for its workers in

(1) 1 Dig. 411.
(2) St. Germain, as cited in Essay on the Law of Bailments, p. 97.
(3) Nareda, 2 Dig. 283.
(4) Nareda, 2 Dig. 281, et seq.

the precious metals, to whom gold or the like being entrusted to make into ornaments, for hire, in proportion to the quality, and the nature of the thing wanted, [1] whether the workman contract for the piece of work, or for time, if he fail in performance, he forfeits his hire, though the work want but little of being completed, or the time of being expired; [2] and, as he is bound to be diligent in the execution of what he has undertaken, so is he answerable for reasonable care; that is, for any injury to, or loss of, what has been entrusted to him, that can be traced to his fault. [3] So, in the case of a common carrier, he is responsible for a loss, not happening by the act of God, or of the king; to which, for any thing appearing to the contrary, may be added seizure by robbers, the carrier not having led to it, by any indiscretion of his own, much less by any concurrence on his part, direct or implied; [4] in which respect the Hindu differs from other later codes, particularly from the law of England, which makes the carrier liable for a loss by robbers, under whatever circumstances; on the ground of *policy*, lest he should combine with them, for the purpose, without the possibility of detection. [5]

Thus has been discussed the comprehensive, and important contract of bailment, under its various aspects, as

(1) 1 Dig. 408.—2 Id. 77.

(2) Menu, ch. VIII. 215, et seq. —*Vriddha* Menu, 2 Dig. 275.
Matsya Purana, Id. 276.
2 Bombay R. p. 234.

(3) Vishnu, 2 Dig. 271.

(4) Nareda, 2 Dig. 272.—Yajnyawalcya, Id. 274.
Vriddha Menu, Id. 272.—Menu, ch. VIII. 408.

(5) Essay on the Law of Bailments, p. 103.

recognized by the Hindu law; the bailor in every case, retaining, in the thing bailed, a reversionary interest, to take effect, as soon as the purpose of the bailment shall have been answered; the bailee being bound to preserve with care, greater or less, according to the nature of the bailment, the thing bailed, while his temporary property, or possession of it continues; as well as to perform about it, with effect, whatever he may have undertaken.

2. The next contract to be considered, according to the order that has been proposed, is that of *loan*, or borrowing, for *consumption*;—whether of money, or other thing, answering the description.(1) It differs from loan for *use*, (which is a bailment,) in that the property of the money, or other thing lent for consumption, vests in the borrower, to be (not returned, but) replaced by him, with an equivalent;—together with such compensation for the loan, as may have been stipulated. The compensation for the loan of money is *interest*; and for performance of the terms of the contract, on the part of the borrower, it is usual to take *security*, consisting in *pledges*, or *sureties*, or both:—of each of which two subjects, namely *interest* and *security*, in their order.

Though interest upon loans appears to have been always allowed by the Hindu law, yet, prohibited, as it is, as a means of acquisition to the two higher classes of Brahmin, and Cshatrya, the prejudice that existed against it with the Jews, and among other ancient nations, operated, it is plain, with the Hindu legislator; according to whom,

(1) Menu, ch. VIII. 151.—1 Dig. 32.
Harita, 1 Dig. 53.

"neither a *priest*, nor a *military* man must *receive* interest "on loans; though each of them (he adds) may pay the "small interest permitted by law, on borrowing for some "pious use, to the *sinful* man who demands it."(1) But, as the Jews, restricted from taking it from one another, were permitted to take it from a stranger,(2) so is it expressly allowed to the *mercantile* class, (the *Vaisya*,) as an unexceptionable mode of subsistence.(3) Appropriate kinds are specified, varying in number with different authorities, according as it has been contracted for; (4) which Menu says, ought to be from day to day,(5) though it is most commonly reserved by the month.(6) The longer or shorter period, by which interest is reckoned, concerns the option of repayment, and the avoiding of fractions. A short period being considered to be in the debtor's favour, the creditor is not to stipulate for reckoning it by a longer one. Whatever may be the rate demandable by the *sinful man*, upon a loan for a *pious use*, it has, in general, ever been high in India, according to the risk run, and in the direct order of the classes; a higher rate being demandable, as the class whether of the borrower or lender is inferior;—the lower the tribe, the higher the interest that may be exacted.(7) It varies also

(1) Menu, ch. X. 117.—1 Dig. 434.—2 Id. 137.
(2) Deut. ch. XXIII. 20.
(3) Menu, ch. X. 115, 116.—2 Dig. 135, et seq.
(4) Texts and Commentary, 1 Dig. 49 to 51.
(5) Menu, ch. VIII. 151.
Id adeo argentum ab Danistâ
Apud Thebas sumpsit fœnore
In dies minasque argenti singulas, nummis.—PLAUTUS.
(6) Jagannatha, 1 Dig. 34.
(7) Menu, ch. VIII. 142. -1 Dig. 45.—Post, Append. to ch. XII. p. 472.—E.

according to the existence, or non-existence of a pledge.(1) Involved in apparent contradiction, the subject is considered by Jagannatha to be intricate;(2) nor has his commentary always the effect of elucidating what is obscure, or disentangling what is perplexed. Though the law has prescribed certain rates, as respectively applicable to the different classes, and serving, as they do, to govern cases, in which interest becomes payable, without previous agreement, it is to be collected, that the rules on the subject leave the parties at liberty to disregard them, substituting other terms, where they think proper.(3) Like our own, the Hindu law contemplates cases, where the risk being greater than the specified rate will compensate, a higher may be bargained for, according to the nature of it, whether it be by sea, or by land, answering, in some degree, to our *respondentia;* the consideration, in these cases, being not only the increased risk of non-payment, but the superior profit accruing to the borrower, by the danger to which he and his property are exposed:—in all cases of the sort, the adjustment of the interest is to be settled between the parties, "by men well acquainted with sea "voyages, or journies by land;—with times, and with "places."(4) It has shewn the same consideration, where the contract has taken place in a *foreign country*, the rule being, that, however different, the customary

(1) Menu, ch. VIII. 140, et seq.—1 Dig. 29, et seq.
(2) 1 Dig. 53.
(3) Catyayana, 1 Dig. 50.—Id. 70, et seq.
(4) Yajnyawalcya, 1 Dig. 46.—Id. 80.
Menu, ch. VIII. 157.—1 Dig. 48

rate prevails, and must be paid.(1) Whatever be the rate, or the reservation of it, all authorities seem to be agreed, that interest, while it continues so, cannot bear interest; and that compound interest cannot be contracted for.(2) At the same time, the debtor being unable to pay the interest reserved, at the time agreed, nothing exists to hinder the parties from renewing the contract, first coming to an account, and turning the interest due into principal; from which date it will, in effect, carry interest.(3) But, it imports the lender not to let interest so run in arrear, as to equal the principal, before coming to such an account; since it is also settled, (as with us,) that it never can be allowed to exceed the principal; but must stop there, as it does upon a tender.(4) The position, however, is confined, generally, to loans of *money*;—not extending to *grain*, and other things of which loans may be made, not involving the notion of *usury*. Of those, the amount of interest, running on, is not limited to the principal.(5) On the other hand, many things are enumerated, that, in their nature, bear no interest; as a debt contracted at play; a sum due on account of suretyship; an unliquidated demand, and others; though, upon any of them, it may be reserved by agreement.(6)

To proceed to the subject of *sureties*, that of *pledges*

(1) Nareda, 1 Dig. 53.—Id. 83. 86. 88.

(2) Menu, ch. VIII. 153.—Vrihaspati, 1 Dig. 49. Nareda, 1 Dig. 50.—Yajnyawalcya, id. 51.

(3) Menu, ch. VIII. 154, 155.—1 Dig. 65. 63.—Vrihaspati, 2 Dig. 70.

(4) Yajnyawalcya and Vishnu, 1 Dig. 133.—Gautama, id. 138. Post, Append. to ch. XII. p. 473.

(5) Menu, ch. VIII. 151, and Texts from lxii. to lxx. with the Commentary, 1 Dig. 112 to 123.

(6) Texts lxxi. to lxxv. with the Commentary upon them, 1 Dig. 124 to 133.

having been already discussed.(1) In the adoption of sureties, a variety of persons are enumerated, who (it is said) should never be accepted as such. The exceptions involve either some inconsistency with prior engagements, or some incompatibility with subsisting connexions; if not an evident risk of the object failing, from the character, or description of the person proposed, in the event of his being selected, as the intended surety.(2) In a system, however, like that of the Hindoos, not restricted to positive ordinance, they may be considered perhaps, for the most part, as affording matter of prudential caution, rather than of legal disqualification;—though the rejection of one undivided brother, as a surety for another, respecting a common interest, would indeed be consonant to the strictest law, as has appeared in the chapter on parceners.(3) Sureties are for appearance, for the honesty of the debtor, or for payment;(4) and bail in an action may be taken from the plaintiff, as well as from the defendant.—Sureties for *payment* are bound for delivery to the creditor of effects pledged by the debtor;(5) as suretyship for *appearance*, includes also that for *ordeal*,(6) (a mode of trial not available in our courts,) so that, if the debtor, liable to ordeal, be not forthcoming, the surety must pay the debt: and, where it is for appearance generally, the production of the debtor, at the

(1) Ante, p. 288.
(2) Catyayana, 1 Dig. 226.
(3) Ante, ch. IX. p. 229.
(4) Vrihaspati, 1 Dig. 233.—Nareda, Id. 237. Yajnyawalcya and Catyayana, Id. 239.
(5) 1 Dig. 246.
(6) 1 Dig. 240.—Ante, p. 231.

time and place agreed, subject to insuperable impediments, must be *bonâ fide*, so that he may be amenable, if living, to payment;(1) the law being indulgent with respect to the time allowed for producing him, where he has absconded; as well as, in every case, with respect to the obligation of the surety to pay, where it has become absolute, by the failure of the principal.(2) The surety for *honesty* is answerable, if, by confidence in his representation, the creditor has been misled:(3) involving a question of responsibility, that occupied, not long since, a good deal of attention in Westminster Hall; upon which the opinions of the Judges of England were divided. Between suretyship for payment, and the other two kinds, there is this difference, that, in the two latter cases, the surety dying, and the principal neglecting to pay, the sons of the surety are not answerable, unless their father was himself indemnified; and then the son is liable; as he is, in all cases, subject always to assets, and without interest, where the undertaking was for *payment*.(4) Of sureties, jointly bound, each is answerable for his proportion only of the debt to be paid, unless it shall have been otherwise agreed.(5) The principal must in all cases, be first sued;—the surety, having paid, has his claim over against his principal, for repayment; the measure of which varies, according to circumstances, and

(1) 1 Dig. 243.—Post, Append. to ch. XII. p. 475.
(2) 1 Dig. 244.
(3) 2 Dig. 235.—1 Bombay Rep. p. 98.
(4) Menu, ch. VIII. 160. 162.—Yajnyawalcya, 1 Dig. 247. Catyayana, id. 248. 250.—Post, Append. to ch. XII. p. 476.
(5) 1 Dig. 257.

according to the nature of the commodity, as distinct from money, for the return of which the principal has contracted.(1)

In all cases of loans, not only is it urged to take either a pledge, or a surety;(2) but the acknowledgment of the surety, and the agreement for the loan, are also recommended to be in writing: of which forms are given in the Digest.(3)—Good rules! but not indispensable;—since, infringing them, "if (says Jagannatha) a man de-"liver a loan, without either pledge or writing, he vio-"lates no duty; and the debt being any how proved, the "debtor shall be compelled by the King to repay it to his "creditor."(4) *Trade*, and *money lending*, though the proper business of the (*Vaisya*, or) *mercantile* class,(5) are permitted even to the Brahmin, and the Cshatrya, if unable to subsist by more appropriate means.(6)

3. The subject of money-lending, or the contract of *borrowing*, having been discussed, the next for consideration is, that of *purchase* and *sale*, or of *exchange*;—barter being, in effect, a sale, and subject to the same rules; the difference consisting only in the distinction between a *price*, which is applicable to a *sale*, and an *equivalent*, which is applicable to *exchange*; as remarked by Jagannatha.(7)

Sale, then, is constituted by payment of the price, and delivery of the article, according to agreement. On

(1) 1 Dig. 258 to 262.
(2) Vrihaspati, 1 Dig. 19.—Nareda, Id. 27.
(3) 1 Dig. 21 to 28.—Id. p. 241.
(4) 1 Dig. 27.
(5) Menu, ch. VIII. 410.—1 Dig. 12.—Ante, p. 16.
(6) Vrihaspati, 1 Dig. 14.—Post, p. 310.
(7) 2 Dig. 336.

goods sold and delivered, but not paid for on demand, interest accrues after six months from the sale; as it does on the price paid, where the article has been "kept back; (1) unless there have been a special agree- "ment, as to the times of delivery and payment." (2) A thing sold, and not delivered, (subject to any special agreement,) is at the risk of the vendor; so that, if, while it remains unduly in his hands, its value sink, he must make it good, with an attention to the eventual profit, where it was purchased for exportation; the same obligation attaching, by whatever means it may be lost. (3) Where the price has not been stipulated, the law implies a reasonable one, *(quantum valebat,)* to be settled, in case of dispute, by merchants. (4) If, instead of paying down the price, *earnest* be paid, and the buyer afterwards break the agreement, the earnest is forfeited; and if, in such case, the seller break it, he is liable to repay the earnest twofold. (5) Where the matter rests on the original agreement, and the vendee, upon its being tendered, refuse to accept the commodity he has bought, there is, with regard to him, an end of the contract; and the owner may dispose of the article as he pleases, the vendee being responsible for any loss, resulting from his not having completed his purchase. (6) One of the most important considerations in every sale, is the security of

(1) Catyayana, 1 Dig. 101.
(2) Nareda, 2 Dig. 319.
(3) Nareda, 2 Dig. 318, 319.—Yajnyawalcya, id. 319.
(4) Nareda, 2 Dig. 329.
(5) Yajnyawalcya and Vyasa, 2 Dig. 327.—Id. 1. 205.
(6) Nareda, 2 Dig. 327.—Yajnyawalcya, id. 304.

the vendee, not only as to the right of the vendor to sell, but as to the thing sold proving what it was represented to be, according to the fair understanding of the buyer. And, upon these two points, as upon so many others, relating to contracts, there is a striking analogy between the Hindu law and our own. With regard to the first, the general principle is, that a *sale without ownership* in the vendor, being void, there is no safety for a purchaser but in *market overt*. Market overt, as opposed to all traffic with suspicious characters in secret places, at improper times, or for unfair prices, as circumstances indicating fraud,(1) is, in strictness, that which is carried on before the king's officers; where, by means of a proper entry, the seller may be known, and got at;(2)—the establishment of *markets* and *fairs*, with the regulations of *weights* and *measures*, as well as the rights of *pre-emption* and *embargo*, having belonged to the prerogative in India, ever since the days of Menu.(3) But, it is said, that *market* is mentioned as an instance only; and that the requisition of the law is satisfied, by a purchase made openly in the presence of respectable persons.(4) The purchase having been so far unexceptionable on the part of the purchaser, it remains for him still, if questioned, to produce the seller, for which time is to be given;(5) who, being produced, the owner

(1) Yajnyawalcya, 1 Dig. 489.—Vrihaspati, Id. 511. Nareda, Id. 512.—2 Id. 14.
(2) 1 Dig. 488, 489.—2 Id. 145.
(3) Menu, ch. VIII. 401. 403. 399.
(4) 1 Dig. 489.
(5) Catyayana, 1 Dig. 484.

recovers his property, and the buyer receives back his price.(1) The seller not being to be found, the owner is entitled to get back his property, paying the buyer one-half what he paid for it; presuming the purchase on his part to have been fair.(2) And, if not having been made in market overt, the buyer cannot produce the seller, he is liable to relinquish the goods so bought to the owner, on proof by the latter of his property;(3)—a sale under these circumstances being regarded as void. The equity of the Hindu rule, where the loss is divided, consists in the supposition of the owner having been in some fault; since otherwise, it is imagined, he could not so have lost his property;—an inference that is made by the law, even where he had been *robbed* of it;(4) for which supposed fault, he forfeits half its value, as the price of getting it back, under the special circumstances; while the purchaser eventually loses half what he gave for it, as a punishment for buying from one, whom he cannot afterwards produce.(5) Not unlike the regulation, among the ancient Visigoths, noticed by Sir William Jones; according to which, "if precious things were deposited, and "stolen, time was given to search for the thief; and, if "he could not be found within the time limited, a *moiety* "of the value was to be paid by the depositary to the

(1) Menu, ch. VIII. 201, 202.—1 Dig. 502. 487, et seq. Marichi, 1 Dig. 510.

(2) The same authorities.

(3) Chandeswara, 1 Dig. 484.

(4) 1 Dig. 129, 130.

(5) Vrihaspati, 1 Dig. 509.—Nareda, Id. 505.—Id. 508. Vishnu, Id. 510.

"owner, *ut damnum ex medio uterque sustineret*."(1) Such is the difference, by the Hindu law, between a *public* and a *private* sale; (2) each implying a warranty, in respect to the title of the vendor; as was the case by the civil law, and is by our own.

With respect to the *second* point, regarding the *integrity* of the article purchased, forming one of the eighteen titles of Hindu law, under the head of "*rescission of purchase and sale*;"(3) here also, the law expects that a thing be, what it is represented to be.(4) But, in general, it is the buyer's own fault, says Jagannatha, if he examine not the commodity;(5) and it is his duty, "to know what may be "the loss on each article, and what the gain."(6) Therefore, it is not sufficient, that the price of an article have been high, to subject the seller, on this account, to have it thrown back upon his hands; it must, for this purpose, have been *excessive*.(7) Of *marketable* things, the prices are, as they may have been settled by authority for the market;(8) any combination to defeat which is punishable with the highest amercement,(9)—being a thousand *panas*.(10) If the desire to rescind the contract arise from the discovery of a blemish, or defect in the article, *unknown to both parties at the time*, it may be returned,

(1) Essay on the Law of Bailments, p. 113.
(2) 1 Dig. 484.
(3) Menu, ch. VIII. 222.—2 Dig. 307.
(4) Menu, ch. VIII. 203.—1 Dig. 514.—2 Id. 316.
(5) 2 Dig. 321.
(6) Nareda, 2 Dig. 313.
(7) 2 Dig. 312, et seq.
(8) Menu, ch. VIII. 402.—Yajnyawalcya, 2 Dig. 333, et seq.
(9) Yajnyawalcya, 2 Dig. 332, 333.
(10) Menu, ch. VIII. 138.

within the period limited for the purpose; different periods being allowed for examination, or trial, according to its nature, as it is more or less perishable. If fraudulently sold, with a concealed blemish, it may be returned at any time.(1) And fines are declared, against those who falsify, or *cheat* in weights, or measures; who *adulterate* drugs or other things, with improper mixtures, for the purpose of sale; or who *disguise* one thing for another, counterfeiting "the skin of a tiger, by colouring the skin "of a cat; or a ruby, by tinging a glass bead with an- "other hue;" for which the penalty is eight times the amount of the sale.(2)

4. The remaining contract, to be adverted to, is that of *debt*, (*Rinadan*,) constituting the first of eighteen titles, enumerated by Menu;(3) reserved for mention here the last, as being involved in, and, for the most part, the result of, other contracts already detailed, rather than a substantive and independant one; respecting which, most that occurs among the only authorities referred to, as such, in this work, has been anticipated, either in the preliminary observations upon contracts in general, referring, among other things, to the circumstances, under which particular persons are, or are not, capable of contracting debt,(4) with the considerations that are excluded, as unlawful;(5) or in the chapter of "Charges on the Inherit-

(1) 2 Dig. 316.—Id. 309, et seq. 314, et seq.
Nareda and Vrihaspati, 2 Dig. 325.

(2) Yajnyawalcya, 2 Dig. 329, et seq.

(3) Menu, ch. VIII. 4. 139.

(4) Ante, p. 276.

(5) Ante, p. 274.

"ance," shewing, how far the obligation of payment attaches, upon the death of a debtor, on his representative; as also the order in which it is to be made, where there is a deficiency of assets;[1] or, lastly, in discussing the two accessory contracts of pledges,[2] and sureties,[3] with the subject of interest.[4] Among the provisions applicable to the subject, is to be noticed the period, within which actions must be brought; being, for the recovery of debt, or other personal matters, ten years.[5] Nor is a suit the only mode of enforcing it; the text of Menu, cited in the Mitacshara, authorizing the recovery of a man's property, "by the aid of laws, divine or human; by "stratagem; by the practice of *acharitum;* and even "by force;"[6]—by *acharitum*, being meant that remarkable one of sitting *dherna* at the door of the debtor, abstaining from food; till, by the fear of the creditor dying at his door, compliance, on the part of the debtor, is exacted;—an alarming species of importunity, prohibited in the Bengal provinces, by one of the Bengal Regulations; the preamble to which, drawn up by the late Mr. Duncan, while president at Benares, gives an interesting description of this extraordinary proceeding;[7] existing in practice probably, rather than war-

(1) Ante, p. 168.
(2) Ante, p. 288.
(3) Ante, p. 299.
(4) Ante, p. 296.
(5) Vribaspati, 1 Dig. 185.—Post, Append. to ch. xii. p. 477.
(6) Bebustah of Hindu officers; Beng. Rep. 1808, p. 175.—Duff's Hist. of Mahrattas, vol. ii. p. 4. Note.—Bishop Heber's Narrative, vol. i. p. 433. Menu, ch. VIII. 48, 49, 50. 176.—1 Dig. p. 337.—Ante, ch. VI.
(7) Vribaspati, 1 Dig. 339. 354.—Asiat. Reg. vol. iv. p. 333.

ranted in law; if it be true, that in a Hindu court, such a settlement would not be pleadable to an action by the creditor, against the same debtor, for the same cause; on the ground, that the debtor should have resisted such a mode of enforcing payment, making his creditor amenable for the attempt.(1) In case of a suit, both arrest and bail are competent; not, however, without consideration of the character of the defendant, as to trustworthiness.(2) If, upon the trial, the plaintiff be convicted of having preferred a false claim, or the defendant of having set up a false defence, either party is liable to be amerced, in twice the amount of the sum in dispute, having done it knowingly:(3) and, under any circumstances, the parties are subject to a tax, towards defraying the charges of judicature.(4) The creditor being of equal or superior class with his debtor, an arrangement may be made for working out the debt;(5) the work stipulated being consonant to the class of the debtor, and not excessive; if it be, he will be entitled to his release.(6) Should he be incapable of labour, time must be given him for payment.(7) Such is the course, where a defendant has no effects to satisfy a judgment; in which case, a Brahmin can only be compelled to

(1) Ellis in MSS. penes me; and see Menu, ch. VIII. 168.

(2) Catyayana, 1 Dig. 346.

(3) Menu, ch. VIII. 59.—Yajnyawalcya, 1 Dig. 367. Post, Append. to ch. XII. p. 454.

(4) Yajnyawalcya, 1 Dig. 372.—Vishnu, Id. 374.

(5) Menu, ch. VIII. 177.—Id. IX. 229.

(6) Catyayana, 1 Dig. 352.

(7) Nareda, with the Commentary, 1 Dig. 353.

pay according to his income, "by little and little."(1) But, in this, and every case of exemption in favour of the Brahmin, one of the sacerdotal class is intended; all being born capable of that class, but few, comparatively speaking, belonging to it; the rest being secular Brahmins, pursuing various worldly pursuits permitted to them by the law.(2) The sacerdotal, learned Brahmin, has indeed various exemptions, extending to capital punishment; but their number has probably, in all time, rendered their claim an evil of no greater importance, than what results in other communities from the tolerance of privileged orders; and certainly not greater than what existed under our own law, while benefit of clergy was in full force.

The above particulars, treated at sufficient length, by Hindu writers, on the title under consideration, it would be impertinent to dwell upon here; the King's Charters, and Company's Regulations, having settled the means, by which matters in dispute between Hindoos are to be pursued, in British courts of justice. For the like reason, the law of *pleading*, (3) and of *evidence*, is passed over, though entering (particularly the latter) into Hindu, as well as European treatises, on the subject of contracts. But these parts of their law, also, not having been, by the Royal

(1) Menu, ch. VIII. 177.
Yajnyawalcya, and Commentary, 1 Dig. 351. 385.
Jagannatha, 1 Dig. 354.

(2) Ante, p. 65. 302.—and see Mr. Rickards, on subject of Castes, with Heber's Narrative, vol. ii. p. 327, 8vo. ed. where the Bishop takes occasion to express the "suspicion he has for some time entertained, that the "distinction of Caste, weighs less on the minds of men" (meaning the *Natives*) "than it used to do."

(3) Menu, ch. VIII.—Vyasa, 1 Dig. 369.—Nareda, Id. 370.

Charters, reserved to the Natives,(1) sufficient be it to observe, that Hindu pleading was noticed with commendation by Sir William Jones; (2) and that, with some trifling exceptions, the Hindoo doctrine of evidence is, for the most part, distinguished nearly as much as our own, by the excellent sense that determines the competency, and designates the choice of witnesses, with the manner of examining, and the credit to be given them; as well as by the solemn earnestness, with which the obligation of truth is urged, and inculcated; insomuch that less cannot be said of this part of their law, than that it will be read by every English lawyer with a mixture of admiration and delight, as it may be studied by him to advantage. (3) Even the *pious perjury*, which it has been supposed to sanction,(4) being resolvable, after all, into no greater liberty, than what our juries (not indeed with perfect approbation) have long been allowed to take, where the life of a prisoner, on trial before them, is at stake,—credit is to be given to the pregnant brevity of the Hindu oath; viz. "What ye know to have "been transacted in the matter before us, between the "parties reciprocally, declare at large, and with truth;"(5) as also to the noble warning, with which the subject, as detailed by Menu, is ushered in, that, "either the Court

(1) See case of Syed Alley *v.* Syed Kullee Mulla Khan (1815); Notes of Cases at Madras, vol. ii. p. 33. Ed. 1827.

(2) See Preface to Dig. p. xii.

(3) Menu, ch. VIII. from v. 13, to v. 122. Yajnyawalcya, 1 Dig. 393. et seq.—Post, Append. to ch. xii. from p. 478, to p. 487.

(4) Menu, ch. VIII. v. 103, 104.—Pref. to same, p. xviii. See Hedaya, vol. ii. b. xxi. p. 666.—Aul. Gell. lib. i. ch. III.

(5) Menu, ch. VIII. 80.

"must not be entered by judges, parties, and witnesses, "or *law* and *truth* must be openly declared."(1) Nor, recurring to the code that has been under consideration, so far as Britain is concerned in administering it, does aught, for the present, appear to remain, but to repeat the hope, that it may adhere to the policy, which dictated to its legislature the *Acts*, preserving to the Hindoos its *essentials*;—a policy, which it employed the powerful energies of one great man, (2) exerted in the service, and for the benefit of his country, anxiously to establish and maintain; as it did those of a distinguished ornament to his profession, exercising in their behalf, both *on*, and *off* the *seat of justice*, his elegant and varied faculties, to illustrate and promote;(3)—a *code*, which liberal minds, making allowance for ancient superstitions, and respecting, with indulgence, primeval usages, will be unwilling to disdain, revered, (as it has been remarked to be,(4)) "as the word of the "Most High!"—just as we, upon evidence deemed by us to be sufficient, believe the Decalogue to have been so delivered, at an early period, to the Jews; while eminent persons among us have thought, (in common with the Hindoos,) that *letters themselves*, so far from being of human invention, were an immediate gift from "the "beneficent Creator."(5) For the system in question, we see plainly, that it is too much a mixture of "despotism "and priestcraft,"(6) to have had the origin ascribed to it.

(1) Menu, ch. VIII. 13.
(2) The late Lord Viscount Melville.
(3) The late Sir William Jones.
(4) Preface to translation of Menu, p. xix.
(5) Menu, cited in 1 Dig. 24.
(6) Preface to translation of Menu, p. xvii.

But let us not, with unbecoming self-sufficiency, be too severe upon human error; unable, as we are, to estimate its source, or judge of its associations. Rather let us, with characteristic generosity, toward a people that deserve well of us, (doing, moreover, by them, as we would be done by,) endeavour to preserve to them, inviolate, at least its most useful portions;—in which hope and confidence, the present essay was begun, and has been finished;—a work, long contemplated, and by many often desired; condensing, with probable, if not with perfect accuracy, within the shortest practicable compass, the principal doctrines of the Hindu law, referable to subjects of special interest, as of the most frequent occurrence;—in the course of which have been adjusted, and applied, the ancient authorities, compared with the opinions of the living; not without attention to the conflicting tenets of different schools; with occasional reference, for the sake of illustration, to other codes, and especially to our own;—the fruit finally, of independant leisure, earned by near twenty years' assiduous administration of justice, among the people whom it concerns. Having accomplished so much, toward rescuing parts of their law from the confusion in which it lies, and the uncertainty that has been thought to characterize it, despondence, as to how the attempt may be received, ought not perhaps to be entertained. At least, a consciousness, as well with regard to the design, as to the care employed in its execution, cannot fail to afford a reward, consonant to such an undertaking; namely, an inward satisfaction, that will, no doubt, be vastly enhanced, should it prove of

the use intended;—thereby virtually contributing to the contentment, and thence to the attachment of our Hindoo subjects, *confessedly partial to their own institutions*; and thus warranting its author in ascribing to his connexion with India, in some small degree, the noble self congratulation, to which the Athenian youth were, with reference to their country, by their early devotions, taught to aspire—Τὴν πατρίδα οὐκ ἔλαττω παραδώσω, πλείω δὲ καὶ ἀρείω.(1)

(1) Patriam liberis non relinquam in deteriore, sed potius in meliore, statu. Petit. Leg. Attic. p. 12. 231.

A.

Account by H. T. Colebrooke, Esq. of the Hindu Schools of Law.

(Referred to Ante, Preface, p. xi.)

The laws of the Hindoos, civil and religious, are by them believed to be alike founded on revelation, a portion of which has been preserved in the very words revealed, and constitutes the Vedas, esteemed by them as sacred writ. Another portion has been preserved by inspired writers, who had revelation present to their memory, and who have recorded holy precepts, for which a divine sanction is to be presumed. This is termed *Smriti*, recollection, (remembered law,) in contradistinction to *Sruti*, audition, (revealed law.)

The Vedas concern chiefly religion, and contain few passages directly applicable to jurisprudence. The law civil and criminal, is to be found in the Smriti, otherwise termed Dharma Sastra, inculcating *duty*, or means of *moral merit*. So much of this, as relates to religious observances, may be classed, together with ancient and modern rituals, (being the designation of *Calpa*, or *Paddhati*,) as a separate branch; and forensic law is more particularly understood when the *Dharma Sastra* is treated of.

That law is to be sought primarily in the institutes, or collections *(sanhitas)* attributed to holy sages: the true authors, whoever these were, having affixed to their compositions the names of sacred personages: such as Menu, Yajnyawalcya, Vishnu, Parasara, Gautama, &c. They are implicitly received by Hindoos, as authentic works of those personages. Their number is great: the sages reputed to be the authors being numerous; (according to one list, eighteen; according to another, twice as many; according to a third many more;) and several works being ascribed to the same author: his greater or less institutes, (*Vrihat*, or *Caghu*,) or a later work of the author, when old, (*Vriddha*.)

The written law, whether it be *sruti* or *smriti*, direct revelation, or tradition, is subject to the same rules of interpretation. Those rules are collected in the *Mímánsá*, which is a disquisition on proof and authority of precepts. It is considered as a branch of philosophy; and is properly the logic of the law.

In the eastern part of India, viz. Bengal, and Bahar, where the Vedas are less read, and the *Mímánsá* less studied than in the south, the dialectic philosophy, or *Nyáya*, is more consulted, and is there relied on for rules of reasoning and interpretation upon questions of law, as well as upon metaphysical topics.

Hence have arisen two principal sects or schools, which, construing the same text variously, deduce upon

some important points of law different inferences from the same maxims of law. They are subdivided, by farther diversity of doctrine, into several more schools or sects of jurisprudence, which, having adopted for their chief guide a favourite author, have given currency to his doctrine in particular countries, or among distinct Hindu nations: for the whole Hindu people comprise divers tongues; and the manners and opinions, prevalent among them, differ not less than their language.

The school of Benares, the prevailing one in middle India, is chiefly governed by the authority of the *Mitácshará* of *Vijynánéswara*, a commentary on the institutes of *Yájnyawalcya*. It is implicitly followed in the city and province of Benares: so much so, that the ordinary phraseology of references for law opinions of Pundits, from the native judges of courts established there, previous to the institution of Adawluts superintended by English judges and magistrates, required the Pundit, to whom the reference was addressed, "to consult the Mitácshará," and report the exposition of the law there found, applicable to the case propounded.

A host of writers might be named, belonging to this school, who expound, illustrate, and defend the *Mitácshará's* interpretation of the law. It may be sufficient to indicate in this place, the *Víramitródaya* of *Mitra Misra*, and the *Viváda tándava*, and other works of *Camalácara*. They do not, so far as is at present recollected, dissent upon any material question from their great master.

The *Mitácshará* retains much authority likewise in the south and in the west of India. But to that are added, in the peninsula, the *Smrĭti Chandricá* and other works bearing a similar title, (as *Dattaca Chandricá*, &c.) compiled by *Dévana Bhatta*, together with the works of *Mádhava Acharya*, and especially the Commentary on *Párásara*, and likewise the writings of *Nanda Pandita*, including his *Vaijàyanti*, and *Dattaca Mímánsá;* and also some writers of less note.

In the west of India, and particularly among the Marahattas, the greatest authority, after the *Mitácshará*, is *Nílacant'ha*, author of the *Vyavahára Mayúc'ha*, and of other treatises bearing a similar title.

In the east of India, the *Mitácshará*, though not absolutely discarded, is of less authority, having given place to others, which are there preferably followed. In North Bahár, or *Mithilá*, the writings of numerous authors, natives of that province, prevail; and their doctrine, sanctioned by the authority of the paramount Raja of the country, is known as that of the Mithila school. The most conspicuous works are the *Vivàda Retnácara*, and other compilations under the superintendance of *Chandéswara;* the *Vivàda Chintámani*, with other treatises by *Váchespati Misra;* and the *Vivàda Chandra*, with a few more.

To these are added, in Bengal, the works of *Jimúta Váhana*, and those of *Raghunandana*, and several others,

constituting a distinct school of law, which deviates on many questions from that of *Mithilá*, and still more from those of Benares, and the *Dekhin*, or southern peninsula.

Note by Mr. Colebrooke.

An anonymous author, in a publication entitled, "Ob- "servations upon the Law and Constitution of India,"(1) has adverted to my use of the term *school* in the sense in which it is here employed; and has observed, that I talk "of the Bengal school, and the Benares school holding "different laws, as if the question were of taste, or of the "fine arts."

I am yet to learn why schools are to be restricted to matters of taste and the fine arts; or why jurisprudence is not to be taught and studied in schools. Nor am I aware that any more appropriate term can be chosen, when speaking of diversity of doctrine, deduced by a varied train of reasoning and interpretation, from the same premises.

I may remark, as I pass, that the anonymous author has misquoted me. I am not "found talking of schools "holding different *laws*," but different *doctrine*, and different *opinions*.

(1) P. 240.

When the author, in the same paragraph, affirmed that "uniformity in the law of succession is generally "found in the same state," he had forgotten that the law is not the same in North and South Britain; and perhaps he had never heard of gavelkind and borough English, nor of customs of the city of London, and of the county of York; much less can he have been apprized, that, but a few years ago, almost every province of France, every *Pays Coutumier* in that kingdom, had peculiar laws in relation to succession.

When he censured the Hindoos for want of uniformity in their laws, he overlooked, among his favourite Mahomedans, the discordance of sects, and discrepancy of doctrine.

Can he be ignorant, too, that the Hindu name comprises various nations, differing in language and in manners, as much as the various nations of Christian Europe? It is no more to be wondered, that law should be different in Bengal and Benares, than that it is so in Germany and Spain.

H. T. C.

B.

BY H. T. COLEBROOKE, ESQ.

Extracted from Mr. Tucker's Financial Statement, 1824. (*p.* 238.)

(Referred to Ante, Preface, p. xv.)

As very incorrect notions appear to have been entertained concerning the nature of the "*Pancháyeti,*" prevailing from ancient times in India, it is expedient to consult the writings of the Hindoos themselves, who in treating of the administration of justice, have occasion to advert to the subject. The following is a brief summary from very ample disquisitions, contained in Treatises of Hindu Law.

An assembly for the administration of justice is of various sorts: either stationary, being held in the town or village; or moveable, being held in field or forest; or it is a tribunal, superintended by the chief judge appointed by the sovereign, and intrusted with the Royal Seal, to empower him to summon parties; or, it is a Court held before the Sovereign in person. The two first of these, are constituted at the request of parties, who solicit cognizance and determination of their differences; they are not established by operation of law, or by the act of the King, but by voluntary consent. The two last are Courts of Judicature, established by the

Sovereign's authority: such a Court is resorted to for relief, as occasions occur; and not as the first mentioned, constituted merely for the particular purpose.

To accommodate or determine a dispute between contending parties; the heads of the family, or the chiefs of the Society, or the inhabitants of the town or village, select a referee approved by both parties.

Among persons who roam the forest, an assembly for terminating litigation, is to be held in the wilderness; among those who belong to an army, in the camp; and among merchants and artisans, in their societies.

Places of resort for redress, are, 1st. The Court of the Sovereign, who is assisted by learned Brahmins, as Assessors. It is ambulatory, being held where the King abides or sojourns.

2nd. The tribunal of the Chief Judge ("*Prádvivàca*," or, "*Dharmàdhyacsha*") appointed by the Sovereign, and sitting with three or more assessors. This is a stationary Court, being held at an appointed place.

3rd. Inferior Judges, appointed by the Sovereign's authority, for local jurisdictions. From their decisions, an appeal lies to the Court of the Chief Judge, and thence to the Raja, or King, in person.

The gradations in arbitration, are also three.

1st. Assemblies of townsmen, or meetings of persons belonging to various tribes, and following different professions, but inhabiting the same place.

2nd. Companies of traders or artisans: conventions of persons belonging to different tribes, but subsisting by the practice of the same profession.

3rd. Meetings of kinsmen, or assemblages of relations, connected by consanguinity.

The technical terms in the Hindu, for these three gradations of assemblies are, 1st, *Puga;* 2nd, *Sréní;* 3rd, *Cula.*

Their decisions or awards are subject to revision: an unsatisfactory determination of the "*Cula,*" or family, is revised by the "*Sréní,*" or company, as less liable to suspicion of partiality, than the kindred; and an unsatisfactory decision of fellow-artisans, is revised by the "*Puga,*" or assembly of cohabitants, who are still less to be suspected of partiality. From the award of the "*Puga,*" or assembly, an appeal lies, according to institutes of Hindu Law, to the tribunal of the "*Prád-viváca,*" or Judge; and, finally, to the Court of the *Raja,* or Sovereign Prince.

The "*Puga,*" "*Sréní,*" and "*Cula,*" are different degrees of "*Panchâyeti;*" which, as is apparent, is not in the nature either of a jury, or of a rustic tribunal; but merely a system of arbitration, subordinate to regularly constituted tribunals, or Courts of Justice.

It was not the design of the Bengal regulations to abrogate the "*Pánchâyeti*," or to discourage arbitration.

The judicial regulations of 1772, provided that, "in all cases of disputed accounts, &c., it shall be recommended to the parties, to submit the decision of their cause to arbitration; the award of which shall become a decree of the Court. Every encouragement is to be afforded to persons of character and credit, to become arbitrators; but no coercive means to be employed for that purpose."

This provision, in nearly the same words, of which the above is an extract, occurs in the regulations passed in 1780.

It is repeated in the regulations of 1781, with this addition, that "the Judge do recommend, and as far as he can, without compulsion, prevail upon the parties to submit to the arbitration of one person, to be mutually agreed upon by the parties; and, with this farther provision, that no award of any arbitrator or arbitrators, be set aside, except on full proof, made by oath, of two credible witnesses, that the arbitrators had been guilty of gross corruption, or partiality, in the cause in which they had made their award."

Here we find the first deviation from the spirit of Hindu arbitration: the regulations of 1781 were drawn up by Sir E. Impey, and that deviation, which was

intended to render arbitration more effectual, has, in its consequences, overset the system. Every dissatisfied party, unable to impeach the award of an arbitrator without proving partiality or corruption, set about calumniating the arbitrator; and imputed corruption to him simply, that he might obtain a revision of the award, which, in the Hindu system, he might have obtained in regular course of appeal, without any such imputation. As the practice grew, all respectable persons declined references, lest they should be calumniated by the discontented litigant: and "*Panchàyeti*" has fallen into disuse.

C.

Extract from Bombay Reports, vol. 1. *p.* 2, *note; and vol. ii. p.* 391, 392.

(Referred to, ante, p. 3.)

Parsees:—followers of Zooratusht, or Zoroaster, descendants of the ancient Magi of Persia, who emigrated from their own country to India, upwards of 1000 years ago, when it was overrun by the followers of Mohammed; —having had before them the alternative of dying by the sword, or of submitting to the religion of the conquerors, by whom their ancient books were destroyed; so that every thing concerning their law, rests now in tradition, and compilations of their learned men, since their arrival in India.—On their landing, they entered into a compact with the Hindu ruler, of the town of Sunjum, where they first settled; by which they bound themselves to an observance of the customs of the Hindoos, to the extent that, even in matters connected with the Hindu religion, as adoption, marriage, &c. the ceremonies of the two people are the same; any material difference between them regarding matters of faith and religious worship only, not law.

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